TRADING WITH THE ENEMY

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Onauth Nauth Deb Prize Thesis, 1918

PUBLISHED BY THE

UNIVERSITY OF CALCUTTA

1920

PRINTED BY ATULCHANDRA BHATTACHARYYA
AT THE CALCUTTA UNIVERSITY PRESS, SENATE HOUSE, CALCUTTA

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INTRODUCTION

The following pages are an attempt to discuss the general principles of the law of Trading with the Enemy to which the present war has lent interest and prominence. The law treated of is the English Common Law. The attempt has been to treat it in a manner not too abstract for any earthly purposes, without being a digest of cases with the disadvantage of not being alphabetically arranged. Whether I have succeeded in following this difficult middle path I must leave others to judge. November, 1917.

Post Scriptum.

This essay was handed in towards the end of November, 1917, to compete for a prize announced by the University of Calcutta. The University is publishing it in 1920. I do not quite know whether to regret the delay wholeheartedly. The conclusion of the armistice no doubt took away from the interest of the subject, and now peace has been formally signed. But what is lost in interest may not improbably be gained in greater opportunity for calmer judgments. And whatever one might hope no one seriously expects that the last war has ended all wars.

I have brought my paper 'up to date' as the phrase is. But I have found no necessity of altering any statement of the Law, or modifying any of the opinions expressed. The form of speech namely that of an author writing during the war, remains unaltered. February, 1920.

Trading with the Enemy

CHAPTER I

Emergence of the Rule in Common Law

In the midst of the present colossal struggle in Europe, in which not only the armies of the belligerents are meeting each other in the field, but literally whole nations are hurling themselves on one another; when not merely the soldiers and the statesmen of a warring nation are pitted against the soldiers and statesmen of another, but the financier, the factory-worker and the food-grower of the one are struggling with those of the other, the science of the one is meeting the science of its rival, and even literature and men of letters have descended in the arena, it is a little difficult to realise that there was a time when the rule against trading with the enemy,—the principle that inhabitants of countries at war should not carry on mutual intercourse as if it were peace,—struggled for recognition in the courts of common law of England. But the truth is that war has not always been a business of the whole nation, but was the special concern of the crown,—of kings and princes, not as a matter of constitutional law, but in bare fact and reality. When at the beginning of the sixteenth century, Machiavelli was composing his celebrated hand-book for the benefit of princes in quest of power and greatness, it appeared to him that 'a prince ought to have no other aim or thought, nor select anything else for his study than War and its rules and discipline; for that was

the sole art that belonged to him who rules.'[1] The thought underlying this advice is, as the whole book shows, that princes fight against each other, and the people watch and judge, and obey and follow the victor. The people is the stake in the war of princes. Four hundred years have passed, and in the year nineteen hundred and seventeen a British peer, in a public speech, delivers himself as follows:—"I am a conservative and a strong supporter of the monarchy; but I know the day has passed when a monarchy can make war. The only authority able to make war and peace is the United people."[2] Now, the rule against trading with the enemy is, as Lord Parker says,[3] "a belligerent's weapon of self-protection." And it is not surprising that so long as the real belligerent was the crown and not the people, courts of law which, though king's courts, did not administer the king's law but the common law, would hesitate to make the enemy of the crown the legal enemy of each subject, merely because that might be the logical consequence of the allegiance of the subject to the sovereign, without any further regard to the effect of the rule on the people themselves. It is only when the actual belligerent is not the sovereign or the government, but the "united people" that nobody thinks of questioning the propriety of the rule.

Keeping this aspect of the matter in view let us quickly glance over the history of the emergence and recognition of the rule prohibiting trading with the enemy in English common law.

There can be no reasonable doubt that before the rule was clearly recognised and loyally followed by the courts of

[1] The Prince: opening of the fourteenth Chapter.

[2] Speech by Lord Derby at the Canadian Club at Shornclifee, September 25, 1917.

[3] Daimler Company Limited *v.* Continental Tyre and Rubber Company (Great Britain) Limited, (1916) 2 A. C. 307 (344).

common law, the Court of Admiralty, in the exercise of its Prize Court jurisdiction, had consistently acted on the principle that trading with the enemy, except under a royal licence, subjected the property, the subject matter of such trade, to confiscation. This would appear from the very large number of Prize Court cases, anterior in date to the Napoleonic War, quoted by Lord Stowell in his famous judgment in the case of The Hoop.[1] After citing these older cases Lord Stowell says, "I omit many other cases of the last and the present war, merely on this ground, that the rule is so firmly established, that no case exists which has been permitted to contravene it. * * * * * *

For I take upon me to aver, that all cases of this kind which have come before that tribunal have received an uniform determination." Indeed, is closing his judgment in that case, a judgment to which we shall have presently to refer in more detail, Lord Stowell opines that by the common law of England also such trading must be equally illegal. And he explained the paucity or rather absence of common law cases recognising the rule, as contrasted with the long train of unhesitating decisions of the Admiralty courts by saying that "cases have happened more frequently upon the water, merely in consequence of the insular situation of this country." But one ventures to suspect that another reason was not without its effect in the creation of this difference. For inspite of the recent decision of the Judicial Committee in *the Zamora* case,[2] and in fact as that very litigation discloses, the idea was widely prevalent that the Prize Court was in a manner the executive authority of the crown working through one of its courts. It was the belligerent crown exercising

[1] (1799) I. C. Rob. 196.

[2] (1916) 2 A. C. 77.

its belligerent right for proper prosecution of the war, by entrusting it to one of its courts for more systematic and methodical working of the function. The manner in which prior to the Naval Prize Act, 1864, the High Court of Admiralty was invested with jurisdiction in matters of prize, by virtue of a commission issued by the crown at the commencement of each war was calculated to strengthen the idea. And it did not really receive any shock from the fact that the law which the Prize Court administered was not even the municipal but the international law; for exercise of the executive authority need not necessarily be arbitrary, and the commission itself required the Court of Admiralty 'to proceed according to the law of nations.'[1] The dictum of Lord Stowell in *The Fox*[2] that the King in Council possesses "legislative rights" over a Court of Prize, analogous to those possessed by Parliament over the courts of common law, though disapproved of by the Judicial Committee in 1916,[3] shows clearly in what light the Judges who presided over the Prize Courts looked upon the nature of that Court in the year 1811. It was to be expected that it was in such a court that the rule against trading with the enemy, this "belligerent's weapon of self-protection," would receive the earliest recognition and formulation. And looking at the dates one is disposed to think that it was the clash of the Napoleonic War, in which the nation as a whole was more vitally interested than in any previous wars, that led to the ungrudging recognition of the rule by the courts of common law. And as since that date, in the political history of England the sovereignty has shifted more and

[1] For a form of the commission see the one quoted by Lord Mansfield in Linds *v.* Rodney, (1782) 2 Doug. 612, n. 614, n.

[2] (1811) Edw. 312.

[3] *The Zamora*, (1916) 2 A. C. 77 (95).

more towards the people, the rule has now passed beyond the reach of any chance of cavil in any court of law.

In 1786 the case of Gist *v.* Mason[1] came up for hearing before Lord Mansfield and Ashhurst and Buller, J. J. on a motion for retrial. The original case was for recovery upon certain policies of marine insurance against an English underwriter. The plaintiffs were West India merchants and had property in the islands captured by the French during the last war. It came out in trial that it was a common practice to supply these islands with provisions from Ireland notwithstanding they were in the hands of an enemy. The plaintiffs had for this purpose employed neutral vessels, and had caused them to be underwritten by the plaintiff, from different ports in the continent to Ireland, thence to Madeira and St. Thomas; and to all of them was annexed the liberty of going to any one of the captured islands. The defendant refused to pay where there had been a loss on the ground that the contract of policy was illegal. Lord Mansfield before whom the case was tried was of opinion that the policies were not on the face illegal and directed a verdict for the plaintiff. A new trial was then moved for allowing the defendant to let in evidence to show the illegality. This motion was refused. Lord Mansfield said, in the course of his judgment :—

"This, upon the face of it, is the case of a neutral vessel. It is nowhere laid down that policies on neutral property, though bound to an enemy's port, are void. And indeed I know of no cases that prohibit even a subject trading with the enemy except two; one of which is a short note in Roll. Abr.,[2] where trading with Scotland, then in a state of enmity with this kingdom was held to

[1] (1786) 1. T. R. 88.

[2] 2 Roll. Abr. 173.

be illegal, and the other was a note (which is now burned) which was given to me by Lord Hardwicke, of a reference in King William's time to all the judges, whether it were a crime at the common law to carry corn to the enemy in time of war; who were of opinion that it was a misdemeanour.

"By the maritime law, trading with an enemy is cause of confiscation in a subject provided he is taken in the act; but this does not extend to a neutral vessel."

The other two learned Judges, Ashhurst and Buller, J.J. agreed in rejecting the motion on the short ground that the defendant was to blame in not giving proof of illegality during trial and could not be allowed a further opportunity for the purpose.

Now, it is not very clear why, if trading with the enemy were illegal, the policies were not on the face illegal, and what proofs were wanted for bringing out this illegality. Probably what the learned Judges relied upon was the absence of any formal proof of the existence of a state of war and of the fact that the islands for which the ships and the goods were bound were in enemy occupation. But are not these exactly the things of which there can be no doubt that courts must take judicial notice? It is also not easy to conjecture what led Lord Mansfield to declare that in the maritime law of England neutral bottom gave any sort of protection to a cargo that is otherwise liable to be confiscated. Indeed Lord Stowell was driven to the suggestion that on this point "the words of that great person must have been received with some slight degree of misapprehension."[1] But what is absolutely clear is the firm determination of the Chief Justice of the King's Bench and his two brother Judges of not allowing

[1] *The Hoop*, I. C. Rob. 196 (216).

the contract to be avoided on the ground of invo ving trading with the King's enemies, if it could in any way be helped. It is well-known that Gist *v.* Mason was not an isolated instance, but that such insurances by English underwriters were allowed as a matter of practice, as being beneficial to English trade.[1] In Driefontein's case [2] Lord Halsbury points out that by this practice of insuring enemies' goods one part of the nation was restoring them by insurance what another part took from them by arms. We shall only make one observation. The identity of interest of these two parts of the nation was perhaps not so very apparent to Lord Mansfield towards the close of the eighteenth century as it was to Lord Halsbury at the beginning of the twentieth.

It has been said [3] that it was Lord Mansfield's attitude towards these insurances of ships and cargoes belonging to or meant for the enemy that kept the rule against trading with the enemy uncertain in common law. But there is reason to think that this attitude was not only a cause but also an effect,—the effect of the general disinclination of the common law Judges of the day to regard this rule with any amount of favour. It may be that their disinclination received a strong support from the instance of these insurances which, to their minds, were beneficial to the nation, and showed the desirability of not adhering to the rule with any degree of strictness. In support of this suggestion we shall refer to the judgment of Eyre, C. J. in the case of Sparenburgh *v.* Bannatyne,[4] decided eleven

[1] See the matter discussed in an article, 'Insurance of Foreign Property in War Time' by W. R. Willson, in 32 L. Q. R. 373 (1916).

[2] Janson *v.* Driefontein Consolidated Mines, Limited, (1902) A C. 484 (494).

[3] Tingley *v.* Muller, (1917) 2 Ch. 144 (C.A.): per Scrutton L. J. P. 170.

[4] (1797) I. Bos. & Pul. 163.

years after Lord Mansfield's judgment in Gist *v.* Mason. The exact point which that case decided was, that a subject of a neutral state, taken as prisoner of war while serving with the enemies under commission from the hostile state, can sue in a British court, on a contract entered into with a subject while he was such a prisoner; and no doubt the question which was debated was the capacity of such a person to appear as plaintiff in King's courts, a subject which, as we shall see later on, was a far more ancient and well-settled one in common law than the rule prohibiting trading with the enemy. But in concluding his judgment, Eyre, C. J. observed as follows:—"As to the ground of policy which has been taken in argument for the defendant, *viz.*, that a benefit would result to the enemy from the Plaintiff's recovering, it is a policy perhaps doubtful, certainly remote and which I do not hold to be satisfactory. * * * * * Modern civilization has introduced great qualifications to soften the rigours of war; and allows a degree of intercourse with enemies, and particularly with prisoners of war, which can hardly be carried on without the assistance of our courts of justice. It is not good policy to encourage these strict notions, which are insisted on contrary to morality and public convenience." The passage leaves no doubt as to the attitude of the learned Chief Justice towards the policy of prohibiting intercourse with enemies in general.

But the times were fast changing and the day when all doubts and uncertainties were to be removed and the rule finally and firmly settled in common law, was near at hand.

In 1799 Lord Stowell (then Sir William Scott) decided "the great case" of *The Hoop*.[1] It was an

[1] (1799) I. C. Rob. 196.

Admiralty case and related to the claim of several British merchants to goods purchased on their account in Holland "after the erruption of the French" in that country, in the words of the affidavit, and shipped on board a neutral vessel, and which had been seized as prize. As we have already seen there was never much doubt in the Admiralty Court that the goods were liable to be confiscated as objects of trade with the enemy without the permission of the sovereign. But the case presented some peculiar aspects. It appeared that the goods seized were articles which were regularly imported from Holland in large quantities, prior to the commencement of hostilities, and were particularly wanted for the use of Glasgow, being so essentially necessary for the agriculture and manufacture of that part of the kingdom that even after a state of war had come to exist the claimants had constantly applied for and obtained special orders of His Majesty in Council permitting them to continue the trade. It was the passing of some recent statutes which misled them into thinking that these trades were made legal and special permissions were rendered unnecessary, a view which was assented to by Commissioners of Customs at Glasgow on a reference made to them. The argument was that these circumstances constituted a case entitled to great indulgence. It was to meet this contention that Lord Stowell did not only examine with meticulous care a very large number of Admiralty decisions, to show that there was 'a rule of law on the subject binding upon the court, which he must follow where the rule led him' but, what was of far greater importance, proceeded to discuss elaborately, for the first time, the grounds on which the rule against trading with the enemy without the licence of the crown, rested. This discussion proved of such capital importance in the history and development of the Common Law

on the subject that we shall proceed at once to give its substance.

The first reason for the rule given by Lord Stowell is what we may call a constitutional-logical ground, drawn from the fact that according to the constitution, the sovereign alone can make war and peace. He says, "By the law and constitution of this country, the Sovereign alone has the power of declaring war and peace. He alone therefore who has the power of entirely removing the state of war, has the power of removing it in part, by permitting where he sees proper, that commercial intercourse which is a partial suspension of the war. There may be occasions on which such an intercourse may be highly expedient. But it is not for individuals to determine on the expediency of such occasions on their own notions of commerce, and of commerce merely, and possibly on grounds of private advantage not very reconcileable with the general interest of the state. It is for the state alone, on more enlarged views of policy, and on consideration of all circumstances that may be connected with such an intercourse, to determine when it shall be permitted and under what regulations."

Lord Stowell then proceeds to state, in the following words what according to him is the 'public policy' that lies behind and supports the formal constitutional ground. "Who can be insensible," he says, "to the consequences that might follow if every person in time of war had a right to carry on a commercial intercourse with the enemy, and under colour of that, had the means of carrying on any other species of intercourse he might think fit. The inconvenience to the public might be extreme; and where is the inconvenience on the other side, that the merchant should be compelled, in such a situation of the two countries, to carry on his trade between them, if necessary

under the eye and control of the Government, charged with the care of public safety?"

Next, the rule is attempted to be deduced from "the total inability to sustain any contract by appeal to the tribunals of one country on the part of the other." "A state in which contracts cannot be enforced cannot be a state of legal commerce. If the parties who are to contract have no right to compel the performance of the contract, nor even to appear in a court of justice for that purpose, can there be a stronger proof that the law imposes a legal inability to contract? To such transactions it gives no sanction; they have no legal existence; and the whole of such commerce is attempted without its protection and against its authority."

Lord Stowell concluded his judgment with an eloquent passage in which, doubtless with an eye to the uncertainties prevailing in the courts of common law, he urged that the rule in common law could not possibly be otherwise than it was in the maritime law of England. The passage runs thus,—"What the common law of England may be it is not necessary, nor perhaps proper for me to enquire; but it is difficult to conceive that it can by any probability be otherwise, for the rule in no degree arises from the transactions being upon the water, but from principles of public policy and of public law, which are just as weighty on the one element as on the other, and of which the cases have happened more frequently upon the water, merely in consequence of the insular situation of this country; but where an enemy existed in the other part of the island (the only instance in which it would occur upon the land) it appears from the case referred to by that noble person [1] to have been deemed equally criminal in the jurisprudence of this country."

[1] Lord Mansfield in Gist *v.* Mason, (I. T. R. 88). See *ante*.

The time was ripe and the effect of Lord Stowell's judgment was instantaneous. The next year the rule was finally adopted as an undoubted rule of common law on grounds given by Lord Stowell in *The Hoop*.

This was the case of Potts *v.* Bell,[1] on a writ of error brought from the Court of Common Pleas. It was a suit on a policy of insurance on ship and goods as in the case of Gist *v.* Mason, and as in *The Hoop*, the goods were purchased for British merchants in Holland after the beginning of hostilities and sent by a neutral ship. The policy had been upheld by the Court of Common Pleas in 1798[2] according to the current practice. But this judgment was now reversed. The case was elaborately argued, but Lord Kenyon C. J., on behalf of the court dealt with the matter in a short judgment for reasons which will presently appear. He said that the reasons which had been urged by the King's advocate, and the authorities which he had cited, were so many and so uniform and so conclusive to show that a British subject's trading with the enemy was illegal, that the question might be considered as finally at rest. We may note that the 'authorities' cited were all but one Admiralty cases given in the judgment in *The Hoop*, and the one exception was the short note in 2 Roll. Abr., referred to by Lord Mansfield in Gist *v.* Mason. But this "circumstance of there being that single case only," Lord Kenyon now took as a "strong evidence to show that the point had not been since disputed." Evidently fourteen years before, Lord Mansfield was inclined to think otherwise. Lord Kenyon then closed his judgment thus;—"it might now be taken for granted that it was a principle of the common law that trading with an enemy without the King's

[1] (1800) 8 T. R. 548.

[2] (1798) Bell *v.* Gibson, 1 Bos. & Pul. 345.

licence was illegal in British subjects :—that it was therefore needless, in the case, to delay giving judgment for the sake of pronouncing the opinion of the Court in more formal terms ; more especially as they could do little more than recapitulate the judgment, with the long train of authorities already to be found, in the clearest terms, in the printed report of the case of *The Hoop* published by Dr. Robinson."

Potts *v.* Bell was no doubt the first case in common law which clearly recognised and applied the rule against trading with the enemy ; but as the judgment of that case did nothing more than practically adopt Lord Stowell's judgment in *The Hoop*,—that Admiralty decision remains the leading case on the subject in common law.

The first year of the nineteenth century thus saw the rule finally accepted as a rule of English common law and it has never since been doubted or sought to be evaded or whittled down. Any exhaustive citation of judicial pronouncements of different times is needless, as the point is now absolutely settled. We shall content ourselves with quoting three very learned judges, on the occasions respectively of the three important wars, including the present, in which England has been engaged since the Napoleonic wars. In Esposito *v.* Bowden[1] arising out of the Crimean War, Willes, J., delivering the judgment of the Exchequer Chamber said, "It is now fully established that * * * * a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country and that such intercourse, except with the licence of the crown is illegal. * * * * The force of a declaration of war is equal to that of an Act of Parliament prohibiting intercourse with the enemy except by

[1] (1857) 7 E. & B. 763 (779, 781).

the Queen's licence. As an act of State, done by virtue of the prerogative exclusively belonging to the Crown, such a declaration carries with it all the force of law. It is founded upon the *jus belli* which Lord Coke states to be a portion of the law of England." In Janson *v.* Driefontein Consolidated Mines, Limited,[1] which seems to be the only contribution of the South African War to the law of trading with the enemy, Lord Davey says, "My Lords, there are three rules which are established in our common law. The first is that the king's subjects cannot trade with an alien enemy, *i.e.*, a person owing allegiance to a Government at war with the king, without the king's licence." Pronouncements during the present war are numerous. We shall quote only one. In the very important decision of the House of Lords in Daimler Company Limited *v.* Continental Tyre and Rubber Company (Great Britain), Limited,[2] Lord Shaw says, "There is no debate at this time of day on the general proposition that the direct and immediate consequence of a declaration of war by or against this country is to make all trading with the enemy illegal."

With this we close our brief sketch of the story of the emergence of the rule against trading with the enemy in English common law. A state of war makes trading with the enemy without the licence of the crown illegal. In the first place, such trading constitutes a misdemeanour and is punishable as such.[3] In the second place, the courts visit any transactions involving such trading with what has been called "the sanction of nullity."

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[1] (1902) A. C. 484 (499).

[2] (1916) 2 A. C. 307 (328).

[3] Gist *v.* Mason (I. T. R. 88); see the passage from Lord Mansfield's judgment quoted *ante*.

CHAPTER II

Reasons for the Rule

Having seen the rule established in common law, the next matter to which we must now turn our attention is an inquiry into its ground. What is the foundation of the rule? What are the reasons on which this rule has been made to rest? Though the rule is well-settled for now nearly a century and a quarter, the question is not at all an academic one, but of the first degree of practical importance in the life and development of the law, even at the present moment. For every one having the slightest acquaintance with the subject knows, that in the rule under discussion, the expression "trading with the enemy" is only a technical shorthand. The denotation of neither the term 'enemy' nor of 'trading' coincides with persons and transactions respectively indicated by these words in common speech. The most loyal subject may be an 'enemy' within the rule, and the deadliest enemy outside its scope; and 'trading' may include transactions which even our twentieth century commerce has not yet been able to make its own. This result has been reached by letting the assumed purposes of the rule determine, who is an 'enemy' and what is 'trading.' For whatever might have been the scope of the rule at its inception, judges administering it have from time to time laid down, what according to them are the reasons for this rule; and the manner in which the law has developed in the past, and is now being developed in the numerous cases arising out of the present war, is by judging any disputed application of the rule by the test of these reasons. Persons are held to be 'enemies' or not, intercourses are pronounced to be 'trading' or not,

according as they are judged to be within or outside the mischief of these reasons. We need not develop the point any further here, as in the next three chapters, in which we shall discuss 'who is an enemy' and 'what is trading,' problems, the answers to which really constitute the law relating to trading with the enemy, the subject will meet us at every step. But even this bare statement suffices to show that our present inquiry is the most fundamental problem of the law with which we are dealing.

In trying to formulate these reasons, one becomes conscious of the somewhat curious fact that, in the course of nearly one hundred and twenty years since Lord Stowell's judgment in *The Hoop* in 1799, there is not a single case in which this important matter has been attempted to be dealt with in a manner even approaching thoroughness. One or other of the reasons thought to underlie the rule has been mentioned now and then, for the most part only incidentally, and so far as was deemed necessary for the purpose of deciding the particular matter in hand. And when anything general has been attempted, the result has been statements not comprehensive but only abstract, too general to be of any practical value. Even the number and importance of the cases arising out of the present war have not been able to draw forth any adequate discussion of this fundamental question. A well-known English writer on Private International Law[1] has tried to minimise the absence of any respectable number of general treatises on that subject in the English language by saying that in judging the volume and importance of English contribution, the judgments of England's judges must be taken into account, for the most important of them are really essays on different

[1] Westlake: Article on Private International Law—Encyclopædia Britannica, 10th Ed., Vol. 29, p. 540.

topics of that branch of law. One has to regret that a similar apology is not available in the present case. Here judgments are only decisions.

In this state of things we cannot begin by formulating dogmatically the reasons which have been taken to lie at the foundation of the rule and then support our statement with authorities. What I propose to do is to collect together, in the first place, what we may call a representative collection of judicial pronouncements on the subject, and then try to gather from them the accepted grounds for the rule.

To begin at the beginning, we must start with Lord Stowell's leading judgment in *The Hoop.*[1] In the last chapter we have already quoted the passages from that judgment which are relevant to the present matter. And from that quotation it would appear that Lord Stowell gives what are really not two reasons, but two different kinds of reason in support of the rule. The first is what we have taken the liberty to style the constitutional-logical ground; where the rule is attempted to be shown as following logically from the position that under the constitution the sovereign alone can make war and peace. Commercial intercourse, it is said, is a partial suspension of the state of war, which the sovereign alone has a right to decide upon. Hence, it is against the constitution for a subject to carry on such an intercourse without the permission of the sovereign. The second reason is the reason of 'public policy'; and this, according to Lord Stowell, lies in the necessity of preventing the serious consequences that might follow if under the colour of unrestricted commercial intercourse every person "had the means to carry on any other species of intercourse he might think fit."

[1] (1799) I. C. Rob. 196.

Lord Stowell does not stop to explain what this 'other species of intercourse' and its dreaded 'consequences' might be. No doubt he thought them quite apparent and any explanation unnecessary. If some further light is desired on the point it is perhaps thrown by the case of Potts *v.* Bell [1] in which, as we have seen, the judgment in *The Hoop* was bodily adopted. It will be remembered that Lord Kenyon in his judgment does not at all discuss the law and its grounds, as he apprehended that such a discussion would only result in a 'recapitulation' of the judgment in *The Hoop*. But the 'reasons' which were urged by the King's advocate in his argument appeared to him to be 'conclusive'; and turning to the report of this argument we find that the King's advocate states the reason of public policy as follows:—"Trading with an enemy has always been deemed illegal in a subject on account of the mischievous consequences which ensue from it. The intercourse which it creates between the subject of hostile states necessarily tends to facilitate the conveyance of intelligence to the enemy." There is little to doubt that this possible leakage of intelligence as a consequence or under the cloak of commercial intercourse, which might be useful to the enemy state in its prosecution of war, was the dangerous 'consequence' and its prevention the 'public policy' thought of by Lord Stowell.

It is both interesting and important to note that neither Lord Stowell nor the King's advocate in Potts *v.* Bell considered the economic effect to the enemy state of the interdicted commercial intercourse as of any real consequence. What was to be prevented was the possible non-economic result in the shape of conveyance of intelligence to the enemy that might follow the economic intercourse. This was doubtless because international

[1] (1800) 8 T. R. 548.

commerce had not then assumed anything like its present-day importance, and the resources essential for the carrying on of a war did not even approach, within a measurable distance, the modern bewildering variety and staggering magnitude.

Half a century later, however, during the Crimean War, this economic aspect is put into the forefront in the decision of the Exchequer Chamber in Esposito *v.* Bowden.[1] In delivering the judgment of the Court Willes, J. says, "It is now fully established that, the presumed object of war being as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country." It will be seen that in this passage, crippling of the enemy's commerce is conceived of as an aim of the war, and trading with the enemy is taken to be prohibited as inconsistent with that aim. But in a later passage Willes, J. brings out another phase of the economic aspect. In this case the question was whether a charter party, made before declaration of war against Russia, between an English merchant and a neutral ship-owner, for bringing corn from a Russian port to England, was dissolved by the war between England and Russia. In answering the question in the affirmative Willes, J. says, "It is more than likely that the cargo could not have been put on board without passing through the enemy's custom house and paying export duties. The passing it through the custom house and obtaining a Russian permit for its shipment might have been a slight case; still it would have been a case of dealing with the enemy. The payment of export duties would have supplied him directly with the means of carrying on the

[1] (1857) 7 El. & Bl. 763 (779, 789).

War." Here the economic effect to be prevented by prohibiting trading with the enemy, is the possible increase of the resources of the enemy for prosecuting the war. And taking the two passages quoted above, it is clear that the very learned judge who delivered the judgment of the Exchequer Chamber put forward three different reasons for the rule. First, the inconsistence of such trading with one of the avowed objects of the war, *viz.*, crippling the enemy's commerce; second, the necessity of prohibiting every sort of dealing with the enemy; and third, the policy of preventing the enemy from being supplied with the means of carrying on the war.

We shall now quote some recent statements from cases arising out of the present war.

In Robson *v.* Premier Oil and Pipe Line Company, Ltd.,[1] in which the question was whether an alien enemy is entitled to exercise a right a voting in respect of shares in an English Company, Pickford, L.J., in delivering the judgment of the Court of Appeal, says, "The prohibition of intercourse with alien enemies rests upon public policy, and we can see no ground either on principle or authority for holding that a transaction between an alien enemy and a British subject which might result in detriment to this country or advantage to the enemy is permissible because it cannot be brought within the definition of a commercial transaction. * * * We do not think it necessary to decide whether the principle extends to intercourse, if such there be, which could not possibly tend to detriment to this country or to advantage to the enemy; it is enough to say that in our opinion all intercourse which could tend to such detriment or advantage, whether commercial or not, is inconsistent with the state of war between the two countries and

[1] (1915) 2 Ch. 124(C.A.).

therefore forbidden." Here the Court of Appeal gives as the reason for the rule the very general one of preventing transactions which might result in detriment to the country or advantage to the enemy.

In a similar strain, but with some little more particularity, though at the same time dropping any reference to 'detriment' to the country except what is implied in 'advantage' to the enemy, Lord Reading, C.J. says in Halsey *v.* Lowenfeld,[1] "The prohibition is based on public policy, which forbids the doing of acts that will or may be to the advantage of the enemy state by increasing its capacity for prolonging hostilities and by adding to the resources available to individuals in the enemy state."

In the case of Zinc Corporation, Limited *v.* Hirsch,[2] where the point arose whether a contract between English sellers and German buyers before the outbreak of the war, by which the sellers undertook not to sell any of their zinc concentrates to any person or persons, firm or firms, or corporation or corporations other than the buyers, so long as the agreement lasted, was avoided by the war, Phillimore, L. J. brings out the importance of preventing transactions which tend to diminish the resources of one's own country equally with those which tend to increase the resources of the enemy. He says, "If 'any act or contract which tends to increase the resources of the enemy' is unlawful, as was said in Kershaw *v.* Kelsey,[3] similarly any act or contract with the enemy which tends to diminish the resources of one's own country must be equally unlawful."

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[1] (1916) 2 K.B. 707 (C.A.) 712.

[2] (1916) 1 K. B. 541 (C. A.) 562.

[3] 100 Mass. 573.

In Daimler Company's case,[1] Lord Shaw deduces the rule thus:—"War is war, not between Sovereigns or Governments alone. It puts each subject of the one belligerent into the position of being the legal enemy of each subject of the other belligerent; and all persons bound in allegiance and loyalty to His Majesty are consequently and immediately, by the force of the Common Law, forbidden to trade with the enemy power or its subjects."[2]

In the same case Lord Parker delivers himself as follows:—"The rule against trading with the enemy is a belligerent's weapon of self-protection. I think that it has to be applied to modern circumstances as we find them, and not limited to the applications of long ago, with as little desire to cut it down on the one hand as to extend it on the other beyond what those circumstances require. Though it has been said by high authority to aim at curtailing the commercial resources of the enemy, it has, according to other and older authorities, the wider object of preventing unregulated intercourse with the enemy altogether. Through the Royal licence, which validates such intercourse and such trade, they are brought under necessary control. Without such control they are forbidden."[3]

We may now bring to a close our list of judicial pronouncements. From those we have quoted one thing is quite apparent, *viz.*, that it is not really possible to reduce the accepted reasons for the rule against trading with the enemy to a single one, if the formulation of the reason is to serve any purposes whatsoever; such simplification

[1] (1916) 2 A. C. 307. Daimler Company Limited *v.* Continental Tyre and Rubber Company (Great Britain), Limited.

[2] *Ibid*, p. 328.

[3] *Ibid*, p. 344.

would either be useless, giving no help in the development or understanding of the law, or inadequate and hence misleading in the search for the correct law. But the unification appears to have been attempted. In Porter *v.* Freudenberg,[1] Lord Reading, C. J., delivering the judgment of the full Court of Appeal says, "The law was founded in earlier days upon the conception that all subjects owing allegiance to the crown were at war with subjects of the state at war with the crown, and later it was grounded upon public policy, which forbids the doing of acts that will be or may be to the advantage of the enemy state by increasing its capacity for prolonging hostilities in adding to the credit, money or goods, or other resources available to individuals in the enemy state." With the greatest respect, one ventures to think that this statement is both insufficient and misleading. The conception which founded the rule on the allegiance of the subjects to the crown, making the enemies of the crown also the enemies of the subjects, is yet far from being antiquated. The passage which we have quoted from Lord Shaw's judgment in Daimler Company's case, which was decided after Porter *v.* Freudenberg, is a sufficient proof of that. In fact that conception can never become antiquated, as it supplies the constitutional explanation as to why war, which is primarily the concern of the sovereign is also the concern of the citizens of the state; and holds equally good in the freest democracy as in the most absolute monarchy; and as we have tried to show in the last chapter, the more democratic the constitution the more unhesitating is the acceptance of the principle. Then, it is really a confusion of ideas to think that this constitutional ground and the ground of public policy, whatever that might be, can

[1] (1915) 1. K. B. 857 (C.A.) 868.

ever substitute each other. They are advanced as grounds for the rule not from the same but from totally different points of view. The former, as we have said, is the explanation why individual subjects should not enter into any transactions inconsistent with the state of war brought about by the act of the sovereign; while the latter tries to explain why is it that the sovereign finds it necessary to prohibit or regulate, on declaration of war, certain intercourses between its own subjects and subjects of the enemy state. We have seen that Lord Stowell in *The Hoop*[1] places the two grounds side by side. That great judge never thought that the one could serve as the substitute for the other. In the next place, it is obvious, in the light of the judicial pronouncements we have already quoted, that the second part of Lord Reading's statement is palpably insufficient. The rule against trading with the enemy is not only directed against possible increase in the resources of the enemy state for purposes of war, but also against any possible decrease in the resources of one's own state; and passing out of the economic field altogether, it aims at all kinds of intercourse between the inhabitants of the belligerent state. In support of the first portion of our assertion we need only refer to Zinc Corporation Limited *v.* Hirsch,[2] a passage from Phillimore, L. J.'s judgment in which case we have already quoted. For the second part of our assertion Lord Parker's words only just quoted constitute sufficient authority, and we need hardly recall that Lord Stowell in *The Hoop*,[3] considered commercial intercourse to be dangerous in view of the 'other species of intercourse' it might lead to.

[1] (1799) I. C. Rob. 196.

[2] (1916) I. K. B. 541 (C. A.).

[3] (1799) C. Rob. 196.

So much for attempted simplification at the cost of comprehensiveness. The other method of simplification is by overgeneralising, which refers the rule to the public policy of preventing transactions "which might result in detriment to this country or advantage to the enemy." But unless the 'detriment' and the 'advantage' are further particularised, this abstract statement is scarcely of any help in developing and understanding the law.

In the course of a dissenting judgment in Hugh Stevenson & Sons, Limited *v.* Aktiengesellschaft Für Cartonnagen Industrie,[1] A. T. Lawrence, J., says: "The reason that trading with the enemy is a crime at Common law is that it is an act against the interests of the state. A nation at war has three main elements of force—men, wealth, knowledge. Trading with the enemy tends to increase his stock of the two latter, and is therefore contrary to the interests of the state and the allegiance of the subject." This statement is undoubtedly more satisfactory and far neater than most recent statements on the subject. It brings out the constitutional basis of the rule in the allegiance of the subject. It states the reason for the rule, in very general terms, to lie in the public policy of prohibiting acts against the interests of the state, but does not forget to make it really significant and helpful by particularising the nature and subjects of these prohibitions. And here it does not overlook that in warfare conveying of intelligence to the enemy is not less detrimental to the interests of the state than carrying him food and ammunition. The only point it omits to note is, that the elements of force of the enemy state are not the only things to be considered, but those of one's own state are of equal importance; and that there may be transactions

[1] (1917) 1. K. B. 842 (C. A.) 855.

which tend to diminish the latter and are thus as bad as helping to augment the former.

We must now try to formulate what we consider to be the accepted reasons for the rule against trading with the enemy. The reasons fall into two classes : first, what we may call the constitutional ground ; and second, what has been called the ground of public policy. We have already explained that the two classes are entirely distinct from each other. They are not the species of one genus. If they both attempt to explain the rule, it is in quite different senses of the word ' explanation.'

The constitutional ground has been stated in more than one fashion and in slightly different forms. But the gist of them all is the inconsistency of private intercourse between subjects of belligerent states with their allegiance to their respective sovereigns. This is what forms the basis of Lord Stowell's deduction of the rule from the principle that trading is a partial suspension of war and the sovereign alone can make peace and war. This is what Willes, J., means by pointing out that crippling the enemy's commerce is one of the avowed objects of war. And this is the clear import of Lord Shaw's statement that war is war not between Sovereigns or Governments alone, but also of the citizens of one belligerent state with those of the other belligerent state.

The ground of public policy covers three items. The public policy which prohibits ' trading with the enemy ' is the policy of guarding against the risks of—

(1) Conveyance of intelligence to the enemy state which may be to its advantage in the prosecution of the war ;

(2) Increasing the resources available to the enemy state for the purposes of war ;

(3) Decreasing the resources available to the state for similar purposes.

The 'constitutional ground' we must leave as it is. It is not capable of any further development, or rendering any help in the development of the law. In discussing the details of the law it may be altogether left out of view. It may no doubt lie at the very foundation of the law of 'trading with the enemy,' but has no shaping effect on the form of the superstructure.

The three items in the 'ground of public policy' are the real working principles. It is their conscious and unconscious application which has made the law of trading with the enemy what it is. They have developed that law in the past and are continuing to develop and elaborate it in the present. As stated above they may appear bare and obvious enough; too slender to support the large claim made on their behalf. But it is only by entering into the details of the law that their potency and fruitfulness can be brought home to mind. As we shall presently proceed to an examination of these details, where only we can deal with these principles at all deeply, it is not necessary to make any general observations on their working beyond what has been said in the opening paragraph of the chapter. Only one word, before we close this discussion, on the form of our statement of these three principles. From the judicial pronouncements quoted it will appear that they have been stated by learned judges both with more particularity and with greater abstractness. With the greatest respect, we venture to maintain that any further particularisation will impair the elasticity, and any further generalisation the practical effectiveness of the principles. Both tend to diminish their value as working principles, the only object with which such principles are to be formulated at all.

Our formulation may now claim the support of the authority of Lord Dunedin in the recent case of Ertel

Bieber & Co. *v.* Rio Tinto Company.[1] The House of Lords had to consider if the contract of an English Company to sell to three German Companies cupreous ores from mines in Spain owned by the former was abrogated by the outbreak of war between England and Germany, even though the contract contained a suspensory clause in the event of war. Assuming that the clause meant to include war between England and Germany and implied suspension of all transactions under the contract during such war, the House pronounced the contract void on the declaration of war as against public policy underlying the rule against trading with the enemy. Lord Dunedin after a short examination of the early 'leading cases' concluded thus,—"from these cases I draw the conclusion that upon the ground of public policy the continued existence of contractual relation between subjects and alien enemies or persons voluntarily residing in the enemy country which (1) gives opportunities for the conveyance of information which may hurt the conduct of the war, or (2) may tend to increase the resources of the enemy or cripple the resources of the king's subjects, is obnoxious and prohibited by our Law."[2] This statement gives exactly the three items we have enumerated.

A point that is really involved in our formulation ought perhaps to be made explicit. We have said that the public policy which prohibits trading with the enemy is the policy of guarding against the *risk* of certain undesirable consequences. In practice this can only be worked by making the rule attack transactions and relations as a class because of their tendency in general to produce the consequences. It is not allowable to speculate on the possibilities of a

[1] (1918) A.C. 260.

[2] *Ibid*, p. 274.

particular case. In the words of the same learned judge, in the case we were quoting from, "all trading with the enemy is unlawful at common law as against public policy. Why? Not because of the terms of the particular contract, but because contract in general might enhance the resources of the enemy or cripple those of the subjects of the king."[3]

[3] (1918) A.C. at p. 273. Compare what Lord Sumner says at pp. 286, 288, 289.

CHAPTER III

WHO IS AN 'ENEMY'?

Who are the persons meant by the term 'enemy' with whom 'trading' is prohibited under the rule against trading with the enemy? What determines, in this connection, the enemy character of a person? We shall seek in this Chapter an answer to this question, and discuss the problems to which it gives rise.

Before we proceed, however, one observation has to be made on the nature of the decisions we shall quote and rely upon. The law as to what persons are to be regarded as enemies on declaration of war has developed not solely or even mainly, through decisions relating to trading with the enemy, but in a very large measure in cases in two other, though allied, branches of law; *viz.*, first, the law relating to proceedings in the King's Courts by or against 'alien enemies,' cases where the competence of persons to sue or carry on proceedings in King's Courts was in question on what Lord Kenyon called the "odious plea"[1] of "alien enemy"; and secondly, the Prize Court law relating to seizure of enemy ships and goods, cases where the question of the enemy ownership of property seized as prize was in dispute. Persons, who are to be regarded as enemies, are practically identical in these three branches of law; and judges in deciding cases in one branch, have unhesitatingly drawn upon cases relating to the other two branches. Therefore, in the discussion we are entering upon, we shall quote and rely upon cases from all these three branches of

[1] (1799) Casseres *v.* Bell: 8 T. R. 166 (167).

law, without any further comment as from what particular branch they are taken.

The expression by which it is the practice to designate these interdicted persons,—persons with whom 'trading' is illegal, who cannot institute suits in King's Courts, whose goods are liable to be seized and condemned as prizes, is "alien enemy." Eyre, C. J., says, in one of the earliest cases, "The question is, whether..... the Plaintiff is to be considered as an alien enemy at the time when the writ issued? If he must be so considered, I take it to be a necessary consequence that this action must fail."[1] And in one of the latest, Scrutton, L. J., asks: "What at the present time constitutes an 'alien enemy'?"[2] Now, the natural meaning of this term indicates a subject of enemy nationality, *i.e.*, subject of the State with which the country is in a state of war. There is no doubt that it was with respect to these persons that all rules of prohibition, disability and forfeiture during war, on the score of enemy character, originated; and they still cover, and will always do, by far the greatest extent of the denotation of that term. But taken as a definition of the term, as it is used at the present time, its inefficiency is obvious. For, as Lord Reading, C. J., says in Porter *v.* Freudenberg,[3] "a person may be treated as the subject of an enemy state, notwithstanding that he is in fact a subject of the British Crown or of a neutral state. Conversely a person may be treated as a subject of the Crown notwithstanding that he is in fact the subject of an enemy state." That is, in order to be an "alien enemy" a person need not be either an alien or an enemy, and he may not be an "alien enemy" though he is both an alien and an enemy; which

[1] (1797) Sparenburgh *v.* Bannatyne: 1 Bos. & Pul. 163.

[2] (1917) Tingley *v.* Muller: (1917) 2 Ch. 144 (C.A.) 171.

[3] (1915) 1 K.B. 857 (C.A.) 868.

reminds one of Cuvier's alleged reply to the members of the French Academy when consulted on their proposed definition of a crab as a small red fish that walks backwards, that the definition is perfect with the exceptions, that the crab is not a fish, it is not red, and it does not walk backwards. So the natural meaning of the term "alien enemy" gives us no certain and sufficient light in the search in which we are now engaged. And one must really be permitted to doubt the propriety of qualifying the simple 'enemy' with the adjunct 'alien,' when the latter does not add to its precision as a descriptive term, and complicates it as a technical mark.

There has been no lack of attempts in recent cases, arising out of the present war, to answer in a very short compass the question asked by Scrutton, L. J.[1] The full Court of Appeal in Porter *v.* Freudenberg[2] state it to be clear law that for the purpose of determining enemy character the test is not nationality or domicil, but residence and the place of carrying on the business. "For the purpose of determining civil rights a British subject or the subject of a neutral state, who is voluntarily resident or who is carrying on business in hostile territory is to be regarded and treated as an alien enemy." In Janson *v.* Driefontein Consolidated Mines, Limited.[3] Lord Lindley said, "When considering questions arising with an alien enemy it is not the nationality of a person but his place of business during the war that is important. An Englishman carrying on business in an enemy's country is treated as an alien enemy in considering the validity or invalidity of his commercial contracts. Again the subject of a state at war with this country but who is carrying on business

[1] See *ante*, p. 131.

[2] (1915) 1 K.B. 857 (C.A.) 867, 868, 869.

[3] (1902) A.C. 484 (505).

here or in a foreign neutral country is not treated as an alien enemy; the validity of his contracts does not depend on his nationality nor even on what is his real domicil but on the place or places in which he carries on his business or businesses." After citing the above passage, the judgment of the full Court of Appeal says, "Lord Lindley's statement was not intended to be, and is not, exhaustive. His Lordship, for the purposes of the appeal then before the House of Lords, was considering the character of a trading corporation, and did not purport to deal with persons residing but not carrying on business in the enemy territory. Such a person is equally treated as an alien enemy provided he is voluntarily resident there, having elected to live under the protection of the enemy state." So this case of very high authority[1] lays down two tests of enemy character, *viz.*, residence and place of business. A person is to be regarded as an 'enemy' if either is in the territory of the state with which the King is in a state of war, and he is not an 'enemy' if neither is in such territory.

It is on this view that the interpretation of the term 'enemy' is based in the Trading with the Enemy Proclamation, No. 2, of 9th September, 1914. Paragraph 3 of that Proclamation says, "The expression 'enemy' in this Proclamation means any person or body of persons of whatever nationality resident or carrying on business in the enemy country, but does not include persons of

[1] A judgment of the full Court of Appeal expressly with the purpose "that conclusions might be drawn which would be a guide to the solution of some of the present day problems" (page 866). The judgment was delivered by Lord Reading, C. J., but "after the most elaborate discussion with all the other members of the Court." See *per* Lord Cozens-Hardy, M. R., in Schaffenius *v.* Goldberg: (1916) I, K. B. 284 (C. A.) 299.

enemy nationality who are neither resident nor carrying on business in the enemy country." As Lord Cozens-Hardy, M. R., says in Tingley *v.* Muller,[1] "Para. 8 adopts the rule in Porter *v.* Freudenberg by stating it in a positive and also in a negative form."

A neat statement of the same view is given by Younger, J., in his judgment in Schaffenius *v.* Goldberg,[2] when that case was before the Division Court. The learned judge says, "It is not the nationality, but the residence and business domicil of the plaintiff that are now all important. If these are in enemy country a plaintiff may not sue, whatever his nationality, even if he be a friend. If these are in friendly or neutral territory he may sue, even if he be an enemy born."

We need not multiply similar statements, and we shall not also stop to examine how far these statements are satisfactory or in what respects they are open to criticism. But we shall immediately pass on to a somewhat detailed and methodical examination of the two proposed tests of enemy character, *viz.*, residence and place of business; and our opinion on the above statements will be apparent in the course of that discussion. We shall take the two tests separately, beginning with the test of 'residence.'

Residence as a Test of Enemy Character

When a State enters into war with another State the population of the earth falls into three classes with respect to it so far as Nationality is concerned, *viz.*, (1) Enemy subject, *i.e.*, subject of the state with which a state of war exists; (2) Subject, *i.e.*, the State's own subject,—for our present purposes the British subject; and (3) Neutral, *i.e.*,

[1] (1917) 2 Ch. 144 (C. A.), 156.

[2] (1916) I. K. B. 284 (293).

subject of any of the neutral States. Similarly the territories of the earth also subdivide into three classes, *viz.*, (1) Enemy territory, *i.e.*, territory of the enemy state; (2) the State's own territory,—for our present purposes the British territory; and (3) Neutral territory, *i.e.*, territory of the neutral states.[1] At some risk of being open to the charge of pedantry one must point out that as each of the three classes of persons can reside in any of the three kinds of territories, nine cases of 'residence' arise for consideration. For a systematic treatment of the problems arising out of this test of enemy character, we shall go through all these nine cases, though it is apparent that some of the cases are too obvious to detain us for any length of time.

(I) Enemy Subjects Residing in Enemy Territory

It goes without saying that these persons are 'enemies' par excellence. All the reasons of public policy which prohibit trading with the enemy apply with full and unabated force in their case; and they will always constitute the overwhelming majority of persons who will be treated as enemies. As this is the most usual and obvious case, most of the general statements of the rule against trading with the enemy have been formulated exclusively with this case in view. Thus when Lord Stowell in The Cosmopolite [2] says, "it is perfectly well-known that by war all communication between the subjects of belligerent countries

[1] We refrain from complicating our statement by introducing the case of allied states as the population and territory of an allied state are to be considered as the state's own population and territory. *Cf.* The Panariellos: (1915) 84 L.J. 140 (Ad).

[2] (1801) 4 C. Rob. 8 (10).

must be suspended, and that no intercourse can legally be carried on between the subjects of the hostile states, but by the special licence of their respective Governments": Or when Lord Davey states in the Driefontein's case[1] that "the king's subjects cannot trade with an alien enemy, *i.e.*, a person owing allegiance to a government at war with the king, without the king's licence":—there is scarcely any reasonable doubt that these very learned judges had before their mind's eye solely this most common and usual case, and they were not laying down nationality as a test of enemy character. It is perhaps neglect to look at this aspect of the matter that has been responsible for attempts to reconcile these and similar statements with others denying nationality to be such a test.[2]

(II) Enemy Subjects Residing in British Territory

Undoubtedly there was a time in English Common law when all enemy subjects found in British territory on declaration of war became totally exlex[3]; "When debts and goods found in this realm belonging to alien enemies belonged to the king and might be seized by him."[4] Such being their position they could not of course resort to the king's courts—'could not maintain real or personal actions

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[1] (1902) A. C. 484 (499).

[2] *E. g.*, see the dissenting judgment of Scrutton, L. J., in Tingley *v.* Muller: (1917) 2 Ch. 144 (C. A.) 171, 172.

[3] It is interesting to note, as Sir F. Pollock points out in an editorial note of the report of Schaffanius *v.* Goldberg: (1916) I. K. B. at page 289, that the classical meaning of this word is "outside the law" in the sense of being above it; the present usage occurring from twelfth century downward.

[4] See Hale's Pleas of the Crown, Vol. I, p. 95.

until both nations were at peace.'[1] And as Lord Stowell points out,[2] "a state in which contracts cannot be enforced cannot be a state of legal commerce; ..... the legality of commerce and the mutual use of courts of justice are inseparable." But it is apparent that a view so rigorous and so discouraging to aliens could not continue for any length of time after international intercourse and commerce had developed to any appreciable extent. For, it will be seen, that this treatment of enemy subjects, resident within the state's own territory during war, was not based on any reasons of public policy. Knowledge and wealth which they might acquire during war by intercourse and business with the subjects of the State, were not available to the enemy state as intelligence and resource helping it in the prosecution of the war. Its origin was not any prudent policy of necessary self-protection, but a blind psychology of purposeless retaliation. So it was very early that these stringent rules were modified, and we find Chief Justice Treby declaring in 1697, in a case[3] allowing a French subject resident in England to sue on a bond during war between England and France, "that the necessity of trade has mollified the too rigorous rules of the old law in their restraint and discouragement of aliens," and "that wars at this day were not so implacable as heretofore." An editorial note on the passage from Coke upon Littleton, (Ed. 1832) we have quoted above, says that "on declaring war the king usually in the proclamation of war qualifies it by permitting the subjects of the enemy resident here to continue so long as they peaceably demean themselves." But it is clear that permission to reside really amounts to

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[1] Coke on Littleton, 19th Ed., Vol. I, p. 129(*a*).

[2] The Hoop I. C. Rob. 196 (200, 201).

[3] (1697) Wells *v.* Williams: 1 Ld. Raym. 282.

a declaration that they were not to be treated as 'enemies' with whom all intercourse was illegal and who could not claim any relief in king's courts. For the prohibition would make the permission to reside a mere mockery, and the disability must mean, as Warrington, L.J. says,[1] in a slightly different connection, "that the first man who came along might go and live in his house and, provided he kept outside the Criminal law, might take possession of his property and deal with it as he pleased and the courts of this country could not interfere." We may note that the right of the Crown to confiscate property of enemy subjects probably fell into disuse still earlier; and though it appears that the right is even now an existing right, here is no question of exercising it, unless of course the terrible shock of the present war proves sufficient to rebarbarise Europe to a considerable extent so far as liberal ideas are concerned, for we cannot say that talk of confiscations is not already in the air.

We must now pass to a discussion of the law as it is, modified and liberalised by modern conditions and necessities.

In Porter *v.* Freudenberg[2] Lord Reading, C. J., notices that "so long ago as the year 1454 it would follow from the reported observations of Ashton, J. (Year Book, 32 Hen. 6, 23 (*b*), (5) that if an alien enemy came here under the King's licence or safe conduct he could maintain an action for trespass if any person took his goods from his house." From the case of Wells *v.* Williams,[3] already referred to, and which we shall presently discuss in detail, it would appear that this 'coming over under safe

[1] (1916) I K. B. at page 304.

[2] (1915) I K. B. 857 (C. A.) 869.

[3] (1697) I. Ld. Raym. 282: I. Salk. 46.

conduct' was coming over during war. For in the report of that case as given by Lord Raymond it is stated that there is no need of a safe conduct in time of peace. And if this is so, it is easy to understand why amongst enemy subjects resident within the State during war such persons would be the first to cease to be treated as 'enemies.' More often than not they would be likely to be deserters from the allegiance of the enemy state, and thus subjects of special solicitude to the other belligerent State.

The case of Wells v. Williams,[1] decided in 1697, must be considered the leading authority establishing the rule that an enemy subject, resident within the British territory during war under the King's protection, is not to be treated as an 'enemy.' The report of the case in Salkeld's Digest merely gives the point of the decision and the statement of the law is exactly the same as given in Bacon's Abridgement[2] dealing with Aliens. It runs as follows:—"If an alien enemy comes here subsalvo conductu he may maintain an action; so if an alien amy comes here in time of peace per licentiam domini regis as the French Protestants did and lives here sub protectione and a war afterwards happens between the two nations he may maintain an action, for suing is but a consequential right of protection; and therefore an alien enemy who is here in peace under protection may sue a bond; altier of one commorant in his own country." But the comparatively fuller account of the case as given in Lord Raymond's report, though a little lengthy, is also really worth quoting in extenso. For it would not only be of considerable help in some of our discussions, but the

[1] (1697) I. Ld. Raym. 282: I. Salk. 46.

[2] Vol. I, p. 183 (7th Ed.).

statement of the rule and its reasons as given in that report has scarcely since been improved upon in any way. The report reads thus :—

"Debt upon bond. The defendant pleads, that the plaintiff was an alien enemy, born in France of French parents who were alien enemies and that he came into England sine salvo conductu, and concludes in bar. The Plaintiff replies, that at the time of the making of the bond he was, and yet is, here per licentium et sub protectione domini Regis. The defendant demurs. And Wright Serjeant objected, that it appears that the plaintiff is an alien enemy, and came here sine salvo conductu. He admitted that an alien enemy, who comes here with safe conduct, may maintain an action. But unless there is a safe conduct, though it be per licentiam et protectionem, he cannot maintain an action. For by the same reason a captive or prisoner of war may maintain an action. But to that it was answered and resolved that the necessity of trade has mollified the too rigorous rules of the old law in their restraint and discouragement of aliens. A Jew may sue at this day, but here-to-fore he could not, for then they were looked upon as enemies. But now commerce has taught the world more humanity. And as to the case in question admit that the Plaintiff came here before the war was proclaimed (for so it may be intended) then his action is maintainable. 1. Because there was no need of a safe conduct in time of peace. 2. Though the Plaintiff came here since the war, yet he has continued here by the King's leave and protection ever since, without molesting the government, or being molested by it, he may be allowed to sue, for that is consequent to his being in protection. And Treby Chief Justice said that wars at this day are not so implacable as here-to-fore, and therefore an alien enemy, who is here in protection may sue his bond

or contract; but an alien enemy abiding in his own country cannot sue here."

What then is the condition laid down by this case under which an enemy subject resident in British territory is not treated as an 'enemy'? The only condition is that he resides there under circumstances which imply that he is under King's protection; and this is necessarily implied in the fact that he is allowed to reside there.

Cases, old and new, show that the logical result of this position has been accepted and acted upon. Thus by the beginning of the last century it was established that a prisoner of war was not an 'enemy,'[1] a proposition which was at least doubtful when Wells *v.* Williams was decided, as Serjeant Wright's argument in that case shows. In the case of Sparenburgh *v.* Bannatyne the prisoner of war was the subject of a neutral state made prisoner while serving with the enemies under commission from the hostile state. He sued the Captain of a British merchantman for wages for acting as a crew during the voyage to England from the place of capture, the Governor of which latter place put him on board the merchant vessel, then in great want of hands. He was met by the plea of 'alien enemy.' In deciding in his favour Eyre, C. J., drew a distinction between persons in the position of the Plaintiff and prisoners who were actually subjects of the hostile State. "That character (of an alien enemy) arises from the party being under the allegiance of the State at war with us; the allegiance being permanent, the character is permanent, and on that ground he is an alien enemy, whether in or out of prison. But a neutral, whether in or out of prison, cannot for that reason, be an

[1] (1797) Sparenburgh *v.* Bannatyne. I. Bos. & Pul. 163; (1800) Maria *v.* Hall. 2 Bos. & Pul. 236.

alien enemy ; he can be an alien enemy only in respect of what he is doing under a local or temporary allegiance to a power at war with us. When the allegiance determines, (and it does when he is taken a prisoner) the character determines." But the other two learned Judges, Heath and Rooke, J. J., did not think any such distinction really necessary. They broadly laid down that prisoners of war, even if subjects of the hostile state, were not 'enemies.' Rooke, J., though in deference to the opinion of the Chief Justice agreed to place his judgment in that case on the distinction drawn, saw no reason why a prisoner should not recover even if he were an alien enemy born, as he was under King's protection, and laid in a claim to say at any future day that a person in the situation of the Plaintiff was like the officer (on parole) who pledged his jewel. While the other learned Judge, Heath, J., did not at all refer to this distinction. "The pleas state," he said, "that the plaintiff was adhering to the King's enemies; but a prisoner at war is not adhering to the King's enemies, for he is here under the protection of the King. If he conspires against the life of the King, it is high treason ; if he is killed it is murder ; he does not therefore stand in the same situation as when in a state of actual hostility. It has been said, that a prisoner at war cannot contract ; his case would be hard indeed if that were true. Officers on their parole must subsist like other men of their own rank ; but according to such doctrine they must starve ; for they could gain no credit if deprived of the power of suing for their own debts." In the next case of Maria *v.* Hall the facts were similar to those in Sparenburgh *v.* Bannatyne, but the plaintiff prisoner of war was actually the subject of the hostile state. A motion for ordering him to give security for costs was rejected, Heath, J., observing that it had been determined that a

prisoner of war might maintain an action on a contract for wages.

After the case of prisoners of war the recent decisions holding that an enemy subject resident in the United Kingdom and duly 'registered' (under the Aliens Restriction Act, 1914[1] and the appropriate order in Council) is not an 'enemy'[2]; and that he does not become one by being subsequently 'interned' under the provisions of the same Act,[3] may appear to be *à fortiori* cases. But these cases bring into prominence the question of 'licence' from the Crown which requires consideration. It will be seen that in both the reports of Wells *v.* Williams[4] the King's licence is mentioned, though the ultimate decision in favour of the enemy subject is made to rest on the fact that he is 'in protection.' But protection, as we have said, is implied in the fact that he is permitted to reside, or as Younger, J., says,[5] "it may be that the expression being "in protection" means little more than the consequence to the plaintiff of his being licensed to remain." The 'licence' spoken of is of nothing more, as Warrington, L. J., points out, in the same case, than "simply to remain in this country"[6]. Now, undoubtedly in time of peace such 'licence' is extended to persons of all nationalities who come and reside in the country, for they are permitted to come and reside. The question is, does the declaration of war revoke this pre-war, general licence in case of

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[1] 4 & 5 Geo. 5, Chapter 12.

[2] Princess Thurn and Taxis *v.* Moffitt. (1915) 1 Ch. 58; Approved of by the Court of Appeal in Porter by Freudenberg. (1915) I.K.B. 857 (C.A.) 874.

[3] Schaffenius *v.* Goldberg. (1916) I K. B. 284 (C.A.).

[4] *Ante*, pp. 39-40.

[5] Schaffenius *v.* Goldberg. (1916) I K. B. 284 (293).

[6] *Ibid*, p. 304.

enemy subjects, so that they are to be treated as 'enemies,' unless the state grants them some sort of post-war licence to reside, either expressly or by implication of some act or measure?

The view, answering this question in the affirmative, has been maintained. In *The Hypatia*,[1] a very recent case, Sir Samuel Evans quotes with approval the opinion of Marshall, C. J., in *The Venus*,[2] decided in 1814 by the Supreme Court of the United States that "the right of the citizens or subjects of one country to remain in another, depends on the will of the sovereign of that other; and if that will be not expressed otherwise than by that general hospitality which receives and affords security to strangers, it is supposed to terminate with the relations of peace between the two countries. When war breaks out, the subjects of one belligerent in the country of the other are considered as enemies, and have no rights to remain there." Such a post-war licence is undoubtedly meant when Scrutton, L. J., says,[3] "An alien enemy by allegiance could lose his enemy character for the time if he was residing in the King's dominions..... It used to be, and probably still is, necessary to show a licence or permission from the Crown, express or implied." In fact, this view is also implied in the reasons given for the decisions noted above that an enemy subject who has registered himself in accordance with the order for such registration is not an 'enemy' and is not turned into one by subsequent 'internment.' For, to the argument that in order that an enemy subject resident in the country may not be considered an 'enemy' a 'licence' from the Crown is necessary, it was

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[1] (1917) P. 36 (42).

[2] 8 Cranch. 258 (290).

[3] (1917) Tingley v. Muller. (1917) 2 Ch. 144 (173).

replied that the 'registration' 'operates as a licence by the Crown to the registered person to remain commarant here'[1]; and to the argument that the interument amounted to a revocation of that 'licence,' the answer was that a licence to remain in the country cannot be held to be recalled by an act of the Crown which compels him to remain in this country.[2] It is implied that what we have called pre-war general licence did not survive the declaration of war. Here we should also notice the earlier case of Alcinous *v.* Nigreu,[3] decided during the Crimean War. In that case Lord Campbell, C. J., upheld the plea of 'alien enemy' against a Russian subject resident in England. The Chief Justice seems to have laid down broadly that a Plaintiff enemy subject could not maintain an action during the continuance of hostilities. The exact point of the decision is a little difficult to follow. The plea was that the Plaintiff was an enemy born in the Empire of Russia, and "was not nor is a subject of our lady the Queen by naturalization, denization or otherwise." The Plaintiff seems to have accepted the view of the law implied in this plea, and argued that as Stat. 7 & 8 Vict., C. 66, Sec. 6, gave every alien who had obtained a certificate from the Secretary of State every privilege of a British subject, the plea should show that the Plaintiff had not such a certificate: And the Chief Justice said that when it was averred that the Plaintiff was not here by the permission of the Queen (which however does not appear to have been the exact plea) it was in substance averred that the Plaintiff had not the certificate of the Secretary of

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[1] See (1916) I. K. B. 284 (299).

[2] *Ibid* at page 304.

[3] (1854) 4 E. & B. 217.

State. Now if the case means to lay down, as it rather seems to do, that an enemy subject resident in England is not to be considered an 'enemy' only when he has actually become a British subject by naturalization or otherwise, and that mere residence (or for the matter of that even domicil) will not help him, it seems to run counter to decisions both prior and subsequent, and cannot be taken to lay down correct law.

But apart from that case, we venture to submit that this view itself of the licence in question should not receive assent. In the first place, it is not supported, if not actually contradicted, by the leading case of Wells. *v.* Willams. "If an alien amy comes here in time of peace licentiam domini regis.....and lives here sub-protectione and a war afterwards happens between the two nations, he may maintain an action," says the Salkeld's report of the case[1] and that is also the statement of the law in Bacon's Abridgement.[2] Now this is certainly the general pre-war licence. And secondly, the view is quite unsuited to the requirements and conditions of twentieth century international intercourse, commercial and otherwise. The proper view-point would be to consider the general pre-war 'licence,' what Marshall, C. J., calls 'the general hospitality affording security to strangers,' to continue in favour of persons who become enemy subjects by the declaration of war even after such declaration, unless the state revokes such licence or attaches conditions to it, non-compliance with which will no doubt work a revocation by implication. 'Registration' is not to be looked upon as a licence by the Crown to reside, but as a condition attached to the

[1] See *ante*, p. 39.
[2] See *ante*, p. 39.

pre-existing licence. So, if an enemy subject fails to register himself after an order which requires enemy subjects to do so, he fails to comply with a condition under which he is permitted to continue to reside, and forfeits the licence and consequent protection under which he was living in the country, and becomes an 'enemy.'

It should also be noticed that enemy subjects may come to reside in the country under circumstances in which the presumption must be that the general licence and protection in favour of all foreigners spoken of above were not at all extended to them. Suppose during the present war a party of Germans land unobserved from a submarine on the coast of Britain and secretly take up residence in the country. Certainly they would be treated as 'enemies' in spite of their residence in British territory, not because they have not registered themselves, but for a more fundamental reason, *viz.*, that the Crown's licence and protection were never at any time extended to them, and the enemy character which they had while residing in Germany was never taken off them. It was perhaps in view of some such case that the condition of "without molesting this Government, or being molested by it" was mentioned in Wells *v.* Williams as reported by Lord Raymond,[1] a condition which was debated upon in Schaffenius *v.* Goldberg.[2] For it will be seen that this condition is mentioned only in reference to enemy subjects who come over to reside after the declaration of war.

The case of an enemy subject whose licence to reside must be taken to have been withdrawn, or to whom no such licence was extended, may give rise to rather nice and

[1] See *ante*, p. 40.

[2] (1916) I. K. B. 284 (300, 303).

intricate questions. Supposeh e is found out and taken in custody. Does he continue to remain an 'enemy,' or cease to be so by the fact of being in custody? It appears that his enemy character must be taken to have terminated; for on what principle can his position be worse than that of a prisoner of war? But this is not perhaps a really surprising result, for, after all, it is an enemy at large who is dangerous and not an enemy in custody. Intercourse which can be regulated may be allowed; it is the unregulated intercourse which needs stopping. But what about contracts which he might have entered into with subjects before being taken into custody, his real character being unknown to the latter? Are the contracts invalid, being trading with the enemy, and incapable of enforcement? But this might result in penalising the subject for no fault of his. If the contract be held valid, the enemy subject will be able to enforce it; but this would be to treat him as an 'enemy' before he was in custody only in name and not in fact. Possibly a way out might be sought in some doctrine of estoppel. That is, to treat the contract as invalid; but if the subject sues for its enforcement to refuse to allow the enemy subject to take a plea based on his own wrong. Doubtless the method would be somewhat medieval, but perhaps it is useless to try to be absolutely modern in connection with such an ancient institution as war.

We may then state the result of this discussion, grown probably to unpardonable length, thus:—An enemy subject resident in British territory is not to be treated as an 'enemy,' unless the circumstances under which he resides there are such that the licence (to reside) and protection, which the state extends to all foreigners, resident within its territory, must be presumed to have been withdrawn from him, or that such licence and protection were never extended to him.

(III) Enemy Subject residing in Neutral Territory

From the judicial pronouncements on determinants of enemy character, which we have quoted towards the beginning of this Chapter,[1] there can be no doubt that the generally accepted view is that enemy subjects residing in neutral countries are not 'enemies' but neutrals. We have seen Lord Lindley's statement that "the subject of a state at war with this country but who is carrying on business here or in a foreign neutral country is not treated as an alien enemy."[2] And we know how Lord Reading, C. J., points out [3] that the law is the same with respect to 'residence.' We have also heard Younger J.'s pronouncement that "if these (*i.e.*, residence and business domicil) are in friendly or neutral territory he may sue, even if he be an enemy born."[4] And it is also apparent that the definition of 'enemy' in the Proclamation of 9th of September,[5] which we there quoted, is also founded on this opinion. The expression 'enemy,' says the Proclamation, "does not include persons of enemy nationality who are neither resident nor carrying on business in the enemy country."

The reason for the view is clear. The reasons of public policy which prohibit intercourse with the 'enemy' are supposed not to apply to the case of such persons. Their wealth and knowledge are not available to the enemy state. *Primâ facie,* intercourse with them stands on exactly the same footing as intercourse with subjects of the neutral state in which they may happen to reside.

There can be no doubt that there is some danger of

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[1] *Ante* pp. 32-34.
[2] (1902) A. C. 484(505).
[3] (1915) I. K. B.857(C.A.)869.
[4] (1916) 1 K. B. 284(293).
[5] The Trading with the Enemy Proclamation, No. 2, par. 3.

commercial and other intercourse with enemy subjects, resident in neutral countries, enuring ultimately to the benefit of the enemy state during war. But it seems that this danger must be faced in view of the almost impossible burden which would otherwise be laid on the complicated and delicate organisation of modern commerce, if the nationality of every person, resident anywhere on earth, had to be determined before business transaction could be entered into with him. And we must not also forget that the Common law of trading with the enemy is not the only available means of preventing the enemy State from deriving advantage from the resources of the British Empire. If such an attempt were made through trade with neutral countries there is the order in Council prohibiting imports and exports and any emergency legislation necessary, ready to hand. Thus when the Common Law test adopted in the Proclamation of September 9, 1914, threatened to prove inadequate to meet the requirements of the present war it was augmented by the Trading with the Enemy (China, Siam, Persia and Morocco) Proclamation of June 25, 1915, supplementing the residence test by the test of nationality in several particular instances. But the Common Law should be left to meet the necessities of common wars, unburdened by the emergency rules of an unprecedented and well-nigh world-wide conflagration. These latter should no more form part of the common law of trading with the enemy than that D.O.R.A. should accompany every declaration of war.

(IV-VII) Subject or Neutral residing in British or Neutral Territory

It is almost unnecessary to mention specifically the four classes of persons here contemplated. Obviously they cannot be 'enemies.'

(VIII) British Subjects residing in Enemy Territory

Such persons, though subjects, must be regarded and treated as 'enemy,' for they are as much within the mischief of the reasons of public policy prohibiting trading with the enemy as enemy subjects residing in enemy territory. "A British subject, or the subject of a neutral state, who is voluntarily resident or who is carrying on business in hostile territory, is to be regarded and treated as an alien enemy," says the judgment of the full Court of Appeal in Proter *v.* Freudenberg.[1] "An Englishman carrying on business in an enemy's country is treated as an alien enemy in considering the validity or invalidity of his commercial contracts," said Lord Lindley in the Driefontein's case.[2] The law and its reasons were clearly stated at least as early as 1802 in the case of M'Connell *v.* Hector.[3] Lord Alvanley, C. J., said, "That an Englishman from whom France derives all the benefit which can be derived from a natural-born subject of France, should be entitled to more right than a native Frenchman would be a monstrous proposition. While the Englishman resides in the hostile country, he is a subject of that country." And Rooke, J., said in the same case, "The reason of the disability of the person residing in an enemy's country is, that the fruits of the action may not be remitted to an hostile country, and so furnish resources against this country. For that purpose the case of an Englishman residing abroad does not differ from any other person."

How far the reason given supports the disability of the subject or even of the enemy subject from suing in British

[1] (1915) 1 K. B. 857 (C. A.) 867.
[2] (1902) A. C. 484 (505).
[3] (1802) 3 Bos. & Pul. 113.

Courts is a matter on which we shall have something to say hereafter. But there can be no doubt that it is conclusive so far as 'trading' is concerned. What was contended for the subject resident in hostile territory was, that the right of a natural born subject of the King could neither be forfeited by time or place but only by his own misbehaviour. But all 'natural' rights must give way before the unnatural condition of war, when the safety of the state itself, on which all rights depend, may be in peril.

The adjunct 'voluntary' before 'residence' in the quotation we have given above from Porter *v.* Freudenberg needs some explanation. In another passage in the same judgment the point is more clearly put. "Such a person (*i.e.*, resident but not carrying on business in the enemy territory) is equally treated as an alien enemy, provided he is voluntarily resident there, having elected to live under the protection of the enemy state."[1] What does the proviso exactly mean? A contrast is intended with a person who has to reside in enemy territory against his volition, for instance, a British prisoner of war at present in Germany. But, can unregulated intercourse, commercial or otherwise, even with such a person be allowed? It seems that this is a case where the denotation of the term 'enemy' should not be the same with respect to 'trading' and with respect to disability to sue in British Courts. There is no reason why such prisoners of war should not be allowed to sue in the courts of their own state, in service of which they risked their lives and have lost their liberty; but all the reasons which dictate prohibition of 'trading' with persons voluntarily resident in the enemy territory apply with equal force in their case as well. We should

[1] (1915) 1 K.B. 857 (869).

not omit to note that in Porter *v.* Freudenberg the question of enemy character of persons is discussed with a view to settle " the law relating to proceedings in the King's Courts by or against alien enemies during a State of War."[1]

(IX) Neutral Subjects Residing in Enemy Territory

It is scarcely necessary to say that these persons are 'enemies,' after having seen that by such residence even subjects are treated as 'enemies.'

We have now gone through all the nine cases of 'residence' which we proposed to discuss. We may now bring this lengthy discussion to a close, stating its result in a positive form thus :—

During a state of war, and for the purposes of the law of trading with the enemy ;—

1. All persons residing in the enemy territory, of whatever nationality, are 'enemies.'

2. Enemy subjects residing in British territory are 'enemies,' if they are living there without the 'licence' of the Crown to reside, either because it has been withdrawn from them, or because it was never extended to them.

Place of Business as a Test of Enemy Character

Let us now pass on to the other alleged test of the enemy character of a person, *viz.*, his place of business. Is 'place of business' an alternative test of enemy character with 'residence?' Can the 'place of business' of a person make him an 'enemy' apart from the place of his

[1] (1915) 1 K.B. 857 (866).

residence? Is a person resident in British territory an 'enemy,' if he carries on business or has his place of business in the territory of the hostile state?

High judicial pronouncements, some of which have already been quoted,[1] appear to answer this question emphatically in the affirmative. We have already cited Lord Lindley's classical statement that "when considering questions arising with an alien enemy it is not the nationality of a person but his place of business during the war that is important. An Englishman carrying on business in an enemy's country is treated as an alien enemy in considering the validity or invalidity of his commercial contracts."[2] We have seen the recent authoritative pronouncement of the full Court of Appeal that "for the purpose of determining civil rights a British subject or the subject of a neutral state, who is voluntarily resident or who is carrying on business in hostile territory, is to be regarded and treated as an alien enemy."[3] In the very important decision of the House of Lords in Daimler Company Limited *v.* Continental Tyre and Rubber Company (Great Britain) Limited,[4] Lord Parmoor says, "I do not doubt the proposition that a Company, registered in this Country, would, if proved to be carrying on its business, through its agent or agents, in an enemy country, become enemy in character. I draw no distinction in this respect between a British Company and British-born subject." And from the same point of view Lord Parker lays down, in the same case, that "a Company registered in the United Kingdom but carrying on business in an enemy country is to be regarded

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[1] *Ante* pp. 32-33.

[2] Driefontein's case. (1902) A.C. 484.

[3] Porter *v.* Freudenberg, (1915) I K.B. 857 (C. A.) 867.

[4] (1916) 2 A.C. 307 (351, 346).

as an enemy." That 'residence' and 'place of business' have been generally thought to be two alternative tests is shown by the definition of 'enemy' in the Proclamation of 9th September, 1914,[1] that the expression "means any person.....resident or carrying on business in the enemy country, but does not include persons of enemy nationality who are neither resident nor carrying on business in the enemy country," which clearly implies that a person is an enemy if he satisfies either of the two conditions.

But all the expressions of judicial opinion we have quoted above, and similar statements which may be cited in considerable number from the reports, will be found to be dicta in cases in which there was no necessity of making any distinction between the places of residence and business. And the first occasion that has arisen in which it has become necessary to consider these two separately, has shown up the difficulties of the current view which broadly lays down residence and place of business of a person as two alternative tests of his enemy character. This was in the very recent case of Exparte Muhesa Rubber Plantations, Limited.[2] A Company was incorporated in England with the principal object of acquiring and developing the Muhesa Rubber Estate in German East Africa. The principal, if not the only, business which the Company carried on was the production of rubber on this Estate and the sale of rubber so produced. The Secretary and all the Directors and nearly two-thirds of the shareholders of the Company were British subjects; and its registered office was in the City of London where its meetings were held and

[1] The Trading with the Enemy Proclamation, No. 2, para. 3.

[2] *In re* Hilckes. Exparte Muhesa Rubber Plantations, Limited. (1917) I K.B 48 (C.A.)

whence its affairs were directed ; circumstances, which as we shall hereafter see, make the position of a company analogous to that of a natural person resident in England. Long after the declaration of war with Germany, in January, 1916, this Company offered to prove for a judgment debt due to it against the estate of an insolvent. The trustee in bankruptcy rejected this proof on the ground that the Company was an 'enemy' Company—a German trading concern, and the question pointedly arose whether this Company, British in all other respects, was an 'enemy,' because it carried on business in the enemy territory. Horridge, J., on an appeal by the Company against the trustee's decision, answered the question in the affirmative, relying on the statement of Lord Parker in Daimler Co.'s case, which we have already quoted, that "a Company registered in the United Kingdom but carrying on business in an enemy country is to be regarded as as enemy." But this judgment was reversed by the Court of Appeal (Lord Cozens-Hardy, M.R., and Warrington & Scrutton, L.J.J.) and the Company held not to be an enemy. It was pointed out that a person resident in England if he carries on business in the enemy country during war may, under circumstances, violate the rule against trading with the enemy and make himself liable for it, but such 'trading' cannot change the character of the person himself and turn him into an 'enemy' from a subject or a friend. Lord Cozens-Hardy said :[1] "I have no doubt that this is not an enemy company, but that it is an English Company, a Company which, like any Englishmen may with reference to particular contracts and particular acts render itself liable to the provisions of the Proclamations or to the provisions of

[1] *Ibid*, p. 57.

the Common law in such cases; but that does not turn it into an enemy Company any more than an imprudent act of that nature by an admitted Englishman would make him an alien enemy." And the Master of the Rolls added, "Is every English Company which has a commercial agent in Germany or Austria or Turkey by that one circumstance constituted an enemy Company and incapable of suing? I think the answer to that proposition is too plain to require much elaboration." And the point is discussed a little more elaborately in the judgment of Warrington, L.J.[1] He said, "I cannot help thinking that a good deal of the trouble which has arisen has been caused by confusing that question," *i.e.*, whether the Company 'is an alien enemy within the meaning of the rule which prohibits a person bearing that character from instituting or carrying on proceedings in the Courts of this country during the continuance of the war,' "with one of a totally different character, namely, whether a person resident in this country, and therefore not an alien enemy within the rule that I have mentioned, is carrying on business in an enemy country and therefore infringing the rules of the Common law against trading with the enemy, which is another question altogether. The only question, as I have said, which we have to determine is whether this Company is an alien enemy—that is to say, is the Company resident in this country, or is it a Company resident in an enemy country." After pointing out that the residence of the Company must be taken to be in the United Kingdom, "just in the same way as a natural person physically resident in this country is to be treated as so resident for the purposes of the rules regulating the decision of questions as to whether a person

[1] *Ibid*, pp. 57-58.

is an alien enemy or not," the Judgment proceeds: "There is one thing on which the learned judge has founded his judgment and which I have not yet referred to, but which I must notice. The property of the Company, that which produces its profits or causes it to incur losses as the case may be, is a rubber plantation situate in German East Africa and therefore in enemy territory, and it is said that prior to the outbreak of war this Company had an agent whose business it was, no doubt under the control of the Directors here in London, to see to the cultivation and management of that estate and to provide for the export of the produce. It is said, therefore, that this Company was carrying on business in an enemy country. In my opinion that question is really irrelevant to the question which we have to decide. A person physically resident in this country may be possessed of property in the enemy country, and it may be that the cultivation and management of that property may really constitute the business which he is carrying on. But that does not make him an alien enemy, nor does it make the Company which is otherwise shown to be resident in this country assume an enemy character. It may be that the natural person or the Company may bring itself within the rules against trading with the enemy. That is another matter altogether, and, as I have said, I think a good deal of confusion—if I may say it with all respect—has arisen in the mind of the learned judge through not distinguishing between the two questions which seem to me to be quite distinct, namely, whether a person is an alien enemy and whether a person not an alien enemy is trading with the enemy." To this long extract, for which however we make no apology, we would only add that the 'confusion' is pretty widely prevalent.

It seems to us that at least three causes have contributed to this 'confusion.'

In the first place, it has not always been sufficiently realised that what the rule against trading with the enemy seeks to prohibit is not really trading *in* the enemy country, but trading *with* the enemy country. Certainly, a British subject residing during this war in Germany, and carrying on business within the German Empire (supposing he were allowed to do so!) would not violate the rule against trading with the enemy, and could not be tried for misdemeanour when he comes over to England after the war. Suppose, now, that an Englishman resident in England has a business in Germany which is his only source of income; that the business is managed by an agent in Germany, and carries on its transactions entirely within the boundaries of Germany, having no foreign dealings. What is the position on declaration of war between England and Germany? No doubt the Englishman, resident in England, cannot hold any kind of intercourse with his agent in Germany,—can give him no instructions and can receive from him no information. He cannot also, it seems, receive any remittances of profits from Germany. But is anything wrong done if his agent continues to carry on the business in Germany for him, as best as he can, accumulates the profits for handing over to him on the conclusion of the war? We think even the call for patriotic self sacrifice does not go to the extent of demanding relinquishment of property (and is not business one!) in the hostile territory. And to hold that a subject resident within the state becomes an 'enemy,' if he has a going business in the hostile territory, is really to hold that the law itself demands such sacrifice. But such carrying on of business *in* the hostile territory is not at all within the mischief of the rule prohibiting trading

with the enemy. In fact an English agent of a German principal, resident in Germany, is not legally debarred from carrying on business in England for the German agent [1] during the war, provided all intercourse with the German principal is avoided. On what principle can an Englishman's business in Germany stand on a less favourable footing and the existence of such a business make the Englishman, resident in England, 'an enemy'?

Secondly, 'business' is very often spoken of as an entity, as a sort of person, as very well it might. And it is in a very real sense that 'business' is said to belong to one country or the other. But sufficient care is not taken to distinguish between the character of the business and the character of the owner of the business. In the foregoing illustration of Englishman's German business, it is undoubted law that no one resident in British territory can, during the continuance of the war, enter into transactions with that business, and get out of the charge of trading with the enemy by pleading that he did not so trade, as the business belonged to an Englishman and not to an 'enemy.' For the human agency with which he actually dealt in dealing with the business was person or persons resident in Germany, and thus were 'enemies,' notwithstanding that they were agents of a person who is not an enemy, and acted as such agents. In Daimler Company's case, Lord Shaw says,[2] "This obligation and restraint," *i.e.*, not to trade with the enemy, "is binding in every sense .....No one subject to the laws

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[1] See the provisions of Trading with the Enemy Amendment Act, 1914 (5 Geo. 5, Ch. 12), specially sec. 2 (5). See also Tingley *v.* Muller. (1917) 2 Ch. 144 (C. A.). 160, 161. The decision in that case itself supports the statement.

[2] (1916) 2 A. C. 307 (329).

of this country could be permitted to escape from obedience thereto by pleading that he was acting merely as the hand of others, say a German, Austrian or Turkish Company." And the converse is also true. No such person can trade with a German, Austrian or Turkish, and escape by pleading that such enemy subjects acted merely as hands of persons who are not enemies. From these undoubted facts, the conclusion is vaguely drawn that the owner of a business to trade with which would be to violate the rule against trading with the enemy, is himself an 'enemy.'

Thirdly, the concept of "Commercial domicil" has something to do with the introduction of this confusion. It has long been established by Prize Court decisions that if a person has a commercial domicil in a country, he is to be considered as a merchant of that country, and its hostile, friendly or neutral character determines whether his goods are liable to or protected from maritime seizure.[1] But it has not always been kept in view that 'residence' in that country is a necessary condition of such 'Commercial domicil,' as has been clearly pointed out by Sir Samuel Evans in a case[2] decided very soon after the decision in Exparte Muhesa Rubber Plantations Limited.[3] The President said, "I think that residence in the neutral state is an essential condition of such a domicil. I know of no case where, merely by reason of carrying on business through agents or clerks in a neutral state, subjects of an enemy can acquire a commercial domicil without residence in that State." And what has happened is to confuse this "commercial domicil" with 'place of

[1] *E.g.* see Lord Stowell's celebrated judgment in The Indian Chief. 3 C. Rob. 12. (1800).

[2] *The Hypatia.* (1917) P. 36 (39, 40).

[3] (1917) I. K. B. 48 (C. A.).

business,' a vague enough expression, and then to lay down in the next step that a person becomes a friend or an enemy by 'carrying on business' in a friendly or enemy territory.

So we must conclude as a result of our discussion, that 'place of business' or 'carrying on of business' is really no test of enemy character apart from 'residence'; and that the test of 'residence' is sufficient without these considerations. That it is not necessary to complicate the statement of the law, laying down 'residence' as test, by introducing the concept of "commercial domicil," for 'residence' certainly includes residence for the purpose of trading, which "commercial domicil" is,[1] while the latter does not include residence without any trading, which undoubtedly determines the character, enemy or otherwise, of a person.[2] No doubt 'residence' which is the test of enemy character, need not amount to 'civil domicil,' or permanent residence, *i.e.*, residence in fact and intended to be permanent, at the time, but a condition more easily acquired and lost will do. But 'residence' does not imply any such idea, and for the reason just mentioned "commercial domicil" is not a proper description of the thing required. Bare 'residence,' a reasonably clear and well-understood term, will do admirably what is required of it, without the help of any adjuncts or explanations.

We have now discussed the two proposed tests of the enemy character of a person and stated our conclusions. And before we close this chapter, though, with regret, not the subject with which it deals although it has already occupied much space, we shall shortly refer to one other question. Can the 'nationality' of an enemy subject be always disregarded in determining whether he is 'enemy'

[1] See Dicey's Conflict of Laws, 2nd Ed., p. 742.

[2] See Porter v. Freudenberg. (1915) 1. K. B. 857 (C. A.) 869.

or not, and the question always answered by reference to his country of residence during war? From the previous discussion it will appear that according to the accepted view the answer is in the affirmative. But the view has not passed altogether without challenge. In his dissenting judgment in the case of Tingley *v.* Muller,[1] Scrutton, L.J., discusses the point minutely,[2] and arrives at the conclusion that 'nationality' is really the "governing principle," but the enemy character which it attributes to the subject of the hostile State may be kept in abeyance by his 'residence' in the King's dominions or neutral territory; and therefore no sooner is this cloak of 'residence' removed, his fundamental enemy character reappears. In the case referred to one of the questions which arose for discussion was, when did a German subject who was resident in England when war broke out between England and Germany and thus was not an 'enemy,' become one when he afterwards obtained a Government permit to go to Germany and embarked *viâ* Flushing. Was he an 'enemy' when he was travelling through Holland? The other learned judges who took part in the decision apparently held that he did not become an 'enemy' till he reached Germany and took up his residence there. The master of the Rolls said, "Residence in Germany, not merely crossing the German frontier from Holland, made him an alien enemy."[3] But Scrutton, L.J., held,[4] in accordance with his view stated above, that he became an 'enemy' the moment he left England, *animo non revertendi*, for he had then no 'residence' in the King's dominions or a neutral country to keep his enemy character in abeyance. "If you

[1] (1917) 2 Ch. 144 (C. A.)
[2] *Ibid*, pp. 171-175.
[3] *Ibid*, p. 155.
[4] *Ibid*, p. 175.

can find no domicil his birth or allegiance settles the question. Otherwise a British subject is justified in trading with a German, wherever found, unless it can be proved that the German is resident or carrying on business in Germany, a position which, in view of the very various and dubious purposes for which a German may be at present found outside Germany, seems a very dangerous one," says the learned judge. The danger cannot be said to be non-existent. But at the same time, as has been once pointed out, it is not really practicable to demand that before a British subject can during this war enter into business relations with any person found anywhere, he must first satisfy himself that he is not a German. It is needless to say that a mere temporary absence from Germany does not take away German 'residence,' and that courts will certainly go behind any mere colourable residence. Still can it be said that enemy nationality can be or has altogether been disregarded? If that were so, all the discussion as to Crown's 'licence' to the enemy subject to reside within its territories and the 'revocation' of such licence, would have been totally irrelevant. But no one has as yet considered it to be so. We shall not carry this discussion any further, but conclude by saying that, if Scrutton, L.J.'s view be accepted, another proposition will have to be added to the two which formulate the law of enemy character by the test of 'residence,'[1] *viz.*:—

Enemy subjects, having no actual residence at the time in any country, are to be regarded as 'enemies.'

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[1] *Ante*, p. 53.

CHAPTER IV

WHO IS AN ENEMY? (CONTINUED)

Companies.

We have not as yet said anything regarding the most important and ubiquitous 'person' of the modern commercial world,—the incorporated company. Can it take an enemy character so that business intercourse with it becomes illegal under the rule against trading with the enemy; and if so, what determines this enemy character? This question we have reserved for a separate treatment both on account of its importance and its intricacy. So much of the commerce of the present day is now carried on by incorporated companies that, during the existence of a state of war, it is not less, if not more, important to know what companies are 'enemies,' than what natural persons are so. And the intricacy and difficulties of the subject are due, partly to the fact that here rules of law formed and formulated long before joint-stock enterprise had developed, have to be applied to novel circumstances and ideas, which, moreover, have taken shape under an ideal of eternal peace, without the least regard to warlike conditions; and partly (and probably because of the former fact) to a remarkable divergence of opinion amongst high judicial authorities who have dealt with this question.

The law as to what determines the enemy character of incorporated Companies is, as has been indicated, necessarily of very modern growth. In fact, with the exception of the contribution made by the case of Janson *v.* Driefrontein Consolidated Mines,[1] which arose out of the

[1] (1902) A.C. 484.

South African War, it is being shaped and formed wholly during the present war. And, to speak the whole truth, the law, as it stands at present, has to be gathered and inferred practically from one single case. This is the most important decision of the House of Lords in Daimler Company Limited *v.* Continental Tyre and Rubber Company (Great Britain), Limited.[1] So we propose to start with an account of this case and of the judgments delivered in it. It will be seen that these latter are not unanimous in opinion on the point now under consideration, a fact, which though it makes the law a little hazy and uncertain, perhaps compensates by pointedly bringing out different aspects of the matter, and adds interest and piquancy to the discussion.

The Respondent Company (*i.e.*, Continental Tyre and Rubber Company) was incorporated in England in 1905, under the Companies Acts, and had its registered office in London. It was formed for the purpose of selling in the United Kingdom motor car tyres made in Germany by a Company incorporated there under German law. This German Company held by far the majority of shares of the Respondent Company (more then twenty-three thousands out of a total of twenty-five thousands), and the remaining shares also were all held by German subjects resident in Germany, excepting one share which was registered in the name of the Secretary of the Company, one Mr. Hans Frederick Wolter, who was also a German by birth, but whc took out naturalization papers in 1910, and thus became a subject of the British Crown. All the Directors of the Respondent Company were resident in Hanover, in Germany, and were German subjects. The Secretary was resident in England and managed the

[1] (1916) 2 A.C. 307.

business of the Company there, with the help of two Managers, also resident in England.

After the outbreak of the war between England and Germany, an action was commenced in the name of this respondent company against the appellant, Daimler Company, for a trade debt admittedly due from the latter to the former Company on transactions entered into before the declaration of war. The writ was issued by the solicitors of the Respondent Company upon the instructions of the Secretary. The Appellant Company was willing to pay the sum due if the payment could have been made with safety, *i.e.*, without infringing the law and statute against trading with the enemy. To the action, however, two defences were made, *viz.* :—

(1) That the Respondent Company was an 'enemy' to whom any payment before the close of the war would be trading with the enemy and who was incapable of instituting any suit in British Courts during the continuance of the war.

(2) That, in any event, the Secretary had no authority to instruct the Company's Solicitors to bring the action,—the Directors of the Company not giving him any such authority before the war, and since its outbreak they became incapable of doing so, being enemy subjects resident in enemy territory.

Both these points were considered by the House of Lords and the second plea was unanimously upheld; and the actual order made in the case was that the action was altogether irregular and should be struck out. But it was the first point which was elaborately argued as the main and important question and the judgments delivered by the noble Lords are chiefly concerned with it. And it is with the various opinions expressed on this point, raising

the question of the enemy character of the Respondent Company, that we have to deal.

Eight noble Lords [1] took part in the decision and five judgments were delivered; three of their Lordships,—Viscount Mersey, Lord Kinnear and Lord Sumner,—agreeing with the judgment delivered by Lord Parker, that judgment having been prepared "with the assistance and collaboration" of Lord Sumner, and Viscount Mersey and Lord Kinnear withdrawing the judgments which they had prepared in its favour. As we read these judgments they appear to us to present four views, more or less different from each other, on the question of the enemy character of the Respondent Company, and generally as to what should determine the enemy character of incorporated companies. According to Lord Halsbury, the character of the Corporators should determine the question. And if the Corporators are predominantly 'enemies' (as in the case in question they were practically all 'enemies') the 'Corporation' or the Company itself must be considered to be an 'enemy,' though incorporated in England according to English law. According to the views of Lords Shaw and Parmoor a Company incorporated in England can never be treated as an 'enemy' on the score of the enemy character of its Corporators and Directors. The view presented by Lord Atkinson is that the character of the Corporators does not determine the character of the Company but that it depends on the country where the real business centre of the Company lies, *i.e.*, whence the Directors direct and control the affairs of the Company. The opinion expressed in the judgment of Lord Parker agrees that the seat of control should determine the character of the Company, but that as the ultimate control rests

[1] Earl of Halsbury, Viscount Mersey, Lords Kinnear, Atkinson, Shaw, Parker, Sumner and Parmoor.

with the shareholders, the character of the Corporators may become relevant to the consideration of the character of the Company. Thus Lord Halsbury, on the one hand, and Lords Shaw and Parmoor on the other, represent two extreme views (by which, however, no criticism is meant), while Lord Atkinson and Lord Parker would follow two middle paths, the former inclining to the view of Lords Shaw and Parmoor, and the latter to that of Lord Halsbury.

Lord Halsbury gives reasons for his opinion in a short but vigorous judgment. He says, in substance, that in order to determine whether a Company is an 'enemy' for the purposes of the law against trading with the enemy, it is to be seen who actually gets the money if payment were made to the Company. To the argument that an incorporated Company must be looked upon as a legal entity entirely distinct from its Corporators, a view forcibly expressed by Lord Halsbury himself in Salomon *v.* Salomon and Co.,[1] the noble Earl replies that, that is a question of legal fiction and machinery, useful for the purpose for which they were designed, but irrelevant to the present purpose, for which it is necessary to consider what the thing described as a "Corporation" really is; and that "it is, in fact, partnership in all that constitutes a partnership except the names, and in some respects the position of those who I shall call the managing partners."[2] And that "to attempt to shield the fact of giving the enemy the money due to them by the machinery invented for a lawful purpose would be equivalent to enclosing the gold and attempting to excuse it by alleging that the bag containing it was of English manufacture."[2]

[1] (1897) A. C. 22 (30).

[2] Daimler Company Ltd. *v.* Continental Tyre and Rubber Co. Ltd. (1916) 2 A. C. 307 (316).

One obvious criticism of this view which suggests itself is the difficulty of laying down definitely what proportion of enemy shareholders, or value of their shares would make the Company an 'enemy' Company. "No one could maintain," says Lord Parker,[1] "that a Company has assumed an enemy character merely because it had a few enemy shareholders. It might possibly be contended that it assumed an enemy character when its enemy shareholders amounted to (say) one-half, three-fourths, or five-eighths of the whole, but how if the one-half, three-fifths, or five-eighths held only one-sixth, one-fifth, or one-fourth of the shares. The Legislature might, but no Court could possibly lay down a hard-and-fast rule, and if no such rule were laid down, how could any one proposing to deal with the Company ascertain whether he was or was not proposing to deal with the enemy." Similarly Lord Shaw also points out[2] the difficulties of attaching any workable definite meaning to the term "substantial majority" of enemy shareholders in this connection. But, with the greatest respect, we venture to think that this criticism is more specious than serious. As a matter of fact, when Courts have to do it, they always manage to give a reasonably definite interpretation to what at first sight appears a hopelessly indefinite concept; and somehow succeed in finding practical solution to the theoretically insoluble. If a statute were passed providing that all companies of which a 'substantial majority' or 'preponderant number' of shareholders were "enemies," were to be considered as enemy companies, we do not think that Courts would give up the interpretation of that statute in despair. And it is also not very difficult to discern that

[1] Daimler Company Ltd. *v.* Continental Tyre and Rubber Co. Ld. (1916) 2 A. C. 307 (316).

[2] *Ibid*, p. 333.

Lord Parker's own view only throws the difficulty which he suggests a step further back. He says,[1] "The acts of a Company's organs, its directors, managers, secretary, and so forth, functioning within the scope of their authority, are the Company's acts and may invest it definitively with enemy character. It seems to me that similarly the character of those who can make and unmake those officers, dictate their conduct mediately or immediately, prescribe their duties and call them to account, may also be material in a question of the enemy character of the Company. If not definite and conclusive, it must at least be *primâ facie* relevant, as raising a presumption that those who are purporting to act in the name of the company are, in fact, under the control of those whom it is their interest to satisfy." But what proportion of enemy shareholders or the value of their holdings would suffice to raise this *primâ facie* presumption? The truth is, we submit, that the criticism which ought to be directed against this, or any other theory of enemy character of incorporated companies, is the more fundamental one as to whether the theory when logically elaborated would prohibit all such 'trading' which it is the object of the rule against trading with the enemy to prohibit, and at the same time leave free from attack all other 'trading' which it is not the policy or purpose of that rule to molest. This is the only criticism which can be finally effective. No *à priori* deductions from concepts and rules, however well known and however well-established can settle the matter. For, on the one hand, before the security of the State practically everything must give way; and, on the other, care must be taken that mere vindictiveness does not masquerade in the form of law against

[1] Daimler Company Ltd. *v.* Continental Tyre and Rubber Co. Ltd. (1916) 2 A. C. p. 340.

trading with the enemy. But tested by this criticism can it be said that the theory, which would make the character of a company depend on the character of its shareholders, meets with any success? Take an instance, reversing the facts of the Daimler Company's case. Suppose a Company were incorporated in Germany, according to German law, for the purpose of selling in that country some article of British manufacture, the shareholders of the Company being all Englishmen, resident in England, but the Directors, though British subjects, residing in Germany and directing the affairs of the Company there (unlike the Directors in the Daimler Company's case). On the outbreak of war between England and Germany can a person resident in England carry on a trade with this Company in Germany? Undoubtedly not. But certainly not on the score of the character of the shareholders of the company, for on the supposition, not one of them is an 'enemy.' It will be instantly pointed out that such trading would involve an intercourse between persons, resident in England and Germany respectively, and might possibly add to the resources available to the enemy state. But this is clearly to introduce other tests for determining with what companies trading is forbidden than the predominant enemy character of the shareholders. And, on the other hand, if these foreign considerations are to be applied, it is not easy to see why a company of German shareholders, carrying on its business in England should not be allowed to continue its British trading, subject to the law against trading with the enemy, like any British Company in Britain. It is hardly necessary to point out that this does not affect any precautionary executive measure that might be found necessary, and that the theory of the law is also not affected by any such measures.

This brings us to a closer consideration of the view expressed in the judgment of Lord Shaw. If we have understood that judgment aright, his Lordship practically means to lay down that is not really necessary to characterise an incorporated company either as 'enemy' or 'friend.' It is not so in fact, having no "mind subject to emotions or passions or a sense of duty," [1] and no advantage accrues by treating it as such by a legal fiction, for it serves no useful purpose, if it does not actually cause some confusion to result. All the 'trading, which it is the object of the rule against trading with the enemy to prohibit is, as a matter of fact, inhibited and stopped, if the rule is strictly and logically enforced in respect of intercourse between, 'natural' persons, and it does not become necessary to treat separately the case of this 'artificial' person, the incorporated company. For, in the first place, the rule prohibits not only commercial intercourse with the enemy, but all kinds of unlicensed intercourse. And, secondly, the prohibition applies not only to personal trading but also to trading in a representative capacity. "No one subject to the laws of this country could be permitted to escape from obedience thereto by pleading that he was acting merely as the hand of others, say a German, Austrian or Turkish Company. The prohibition against trading is binding in regard to all action direct or indirect, personal or representative" [1] As a result there is "no human agency possible within the realm through which, and within the law, trading with the enemy could be accomplished. In obedience to that law all trading with the enemy, direct or indirect, stops; no firm or company wheresoever or howsoever directed can so trade, nor can anything be negotiated or transacted for

[1] Daimler Company Ltd. v. Continental Tyre and Rubber Co. Ltd. (1916) 2 A. C. p. 329.

it through any person or agency in this country."[1] And, similarly, in the third place, intercourse with a person who is otherwise an enemy is none the less trading with the enemy because the person acts as the representative of another who may not be an enemy. And this effectually stops business with any person resident in the enemy country representing a Company "wheresoever and howsoever directed." Thus it is not necessary to settle whether a company is of enemy character or not for determining whether a proposed act of trading with it is forbidden, if the view is adhered to that it would be so prohibited if any intercourse is involved with any 'natural' person who is an 'enemy.'

There can be no doubt that this view works admirably well to a certain, and that very high, point. Certainly it clears away much confusion which seems to taboo even innocuous business transactions. It prohibits commerce with the German concern of a Company of English shareholders which ought to be prohibited, but allows business with the British concern of Company of German shareholders which is not really within the mischief of the rule against trading with the enemy. But it seems that the success of the view is not unqualified, specially when attempted trading between belligerent countries through a neutral country is concerned. A person resident in England, who during the present war, negotiates business with a German Company in Germany through an agent of the company resident in a neutral country is undoubtedly guilty of violating the rule against trading with the enemy. It will be pointed out that the indirectness of the means does not get rid of the unlawfulness of the real act. But the point to be noticed is, that here the 'natural'

[1] Diamler Company Ltd. *v.* Continental Tyre and Rubber Co. Ltd. (1916) 2 A. C. pp. 329-330.

character in the case of the latter determines it in the case of the former? It is not easy to understand why this should be so. Nationality is not the test in case of natural persons as it cannot settle whether the wealth and knowledge which trading with them may bring into their possession will not be available to the hostile state as resource and intelligence in war, for it is the object of the rule against trading with the enemy to prevent such a contingency. But the same criticism also obviously applies against the test of country of incorporation in case of Companies. Why should the accident of birth prove here to be of greater effect than in the case of natural persons? So we find the majority of the House of Lords in the Daimler Company's case rejecting the country of incorporation and deciding in favour of the seat of control of the Company as its test of enemy character. If it lies in the enemy territory, if it is from that place that the Directors of the Company manage and direct its affairs, the Company is to be regarded as enemy in character. This is the opinion expressed by Lord Atkinson, and this is the view accepted by Lord Parker, in whose judgment, it will be remembered three other learned Lords concurred. That this must be taken to be the opinion of the majority of the House of Lords is pointed out by Lord Cozens-Hardy M. R. in the case of Muhesa Rubber Plantations, Limited.[1] And it is followed by the Privy Council as the Law laid down by the House of Lords in the Prize case of The Hamborn.[2] Both Lord Atkinson and Lord Parker point out that this test in the case of Companies corresponds to the test of 'residence' in the case of natural persons. Speaking of the absence of any satisfactory evidence as from what centre

[1] (1917) 1 K. B. 48 (C.A.) 55.

[2] (1919) A. C. 993.

the business of the Continental Tyre Company was managed, Lord Atkinson says:[1] "Strange as it may appear, the minute-book of the Company, showing presumably, from what centre the business of the Company was managed and directed, was not given in evidence before any of the three tribunals. The embarrassing and, as I think, rather unfortunate result of this omission is that the full facts, showing in what country, England or Germany, lay the real business centre from which the governing and directing minds of the Company operated, regulating and controlling its important affairs, were, save so far as revealed in the evidence of its secretary, never disclosed. These are, however, the very things which, for the purpose of income tax at all events, have been held to determine the place of residence of a Company.....so far as such a fictitious legal entity can have a residence: De Beers Consolidated Mines *v.* Howe,[2] and I can see no reason why, for the purpose of deciding whether the carrying on by such a Company of its trade or business does or does not amount to a trading with the enemy, they should not equally determine its place of residence. It is well established that trading with the most loyal British subject, if he be resident in Germany, would, during the present war, amount to trading with the enemy, and be a misdemeanour if carried on without the consent of the Crown; the reason being that the fruits of his action result to a hostile country and so furnish resources against his own country; M'Connell V. Hector [3] and Janson *v.* Driefontein Consolidated Mines.[4] The same principle would presumably apply to a trading company

[1] (1916) 2 A. C. 307 (318-319).
[2] (1906) A. C. 455.
[3] 3 Bos. & Pul. 113.
[4] (1902) A. C. 484 (505).

resident in an enemy country." Lord Parker similarly says:[1] "In the case of an artificial person what is the analogue to voluntary residence among the King's enemies? Its impersonality can hardly put it in a better position than a natural person and lead to its being unaffected by anything equivalent to residence. It is only by a figure of speech that a company can be said to have a nationality or residence at all. If the place of its incorporation under Municipal law fixes its residence, then its residence cannot be changed, which is almost a contradiction in terms, and in the case of a Company residence must correspond to the birthplace and country of natural allegiance in the case of a living person, and not to residence or commercial domicil. Nevertheless, enemy character depends on these last. It would seem, therefore, logically to follow that, in transferring the application of the rule against trading with the enemy from natural to artificial persons, something more than the mere place or country of registration or incorporation must be looked at. My Lords, I think, that the analogy is to be found in control, an idea which, if not very familiar in law, is of capital importance and is very well understood in commerce and finance." In the case of natural, living persons the meaning of residence is well-understood, at least tolerably so. But in the case of a fictitious, conceptual 'person' like the incorporated Company its residence can have no meaning apart from its functions. It can only be said to reside by functioning. It is in a very proper sense therefore that its residence may be said to lie in the country where its chief functioning of control takes place, where its heart beats and regulates the flow in its arteries of business.

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[1] (1916) 2 A. C. 307 (339).

We think that if the Company's country of incorporation be imagined as giving it its "nationality," and its seat of control as fixing its "residence," the law of trading with the enemy as laid down with respect to natural persons, may be applied to incorporated Companies on the basis of this analogy, without any serious practical difficulties. This unification of the law is an advantage which is clearly one to be aimed at if not impossible of attainment. And as we have said there are no serious difficulties in the way of this reconciliation in the manner suggested. It scarcely needs be pointed out that a Company is likely to be most intimately connected with that country where its chief controlling centre lies. And this makes the seat of control as test of its enemy character not only a formal, working test, but one based in the nature of things, so far as that is possible in the case of such complex artificial creation of law as the incorporated Company. But in applying the law on the basis of the suggested analogy some considerations and distinctions must always be kept in view if confusion and misunderstanding are to be avoided. It is respectfully submitted that much of the difficulties which have arisen on the question of the mark of enemy character in case of incorporated Companies are due to a lack of attention to these considerations. In some respects they are similar to those which we have discussed in the last chapter in tracing to its sources the 'confusion' which would make a person's place of business an independent test of his enemy character. But the matter is so important that, even at the risk of some repetition, we shall shortly state the chief of these consideration :—

(1) A Company may have 'residence,' *i.e.*, its centre of control in British territory, but may have business relations or 'business' in one or more countries outside such

territory. If one such 'business' is in the enemy country, the Company is not made an 'enemy' Company thereby.[1] But all intercourse of the central control of the Company with such 'business,' agency or branch must immediately stop on the declaration of war. For, as Lord Shaw points out,[2] "there is no human agency possible within the realm through which, and within the law," such intercourse could be carried on. This however does not imply that this 'business' of the Company should not be continued to be managed and carried on *in* the enemy country by its agents there, as best as they can, bereft of all advice and information from the chief managers. This carrying on of 'business,' this preserving the property of the company during war, does not affect the friendly character of the Company following from its seat of control, and turn it into an 'enemy' Company.

(2) A Company having its "residence" in the enemy territory, and thus of an enemy character, may have a 'business' or branch in British territory, managed by agents residing there. On declaration of war all intercourse of these agents with the chief controlling persons in the enemy territory necessarily ceases. Nevertheless there is no violation of the rule against trading with the enemy in allowing the British trading of this branch or 'business' to be carried on during the war, and permitting residents in British territory to enter into business transactions with the British trading. This does not at all imply that the Company loses its enemy character. It simply means that enemy's property within the realm is not confiscated or destroyed, but is allowed to be managed and preserved during the war. Special emergency and

[1] *Ex-parte* Muhesa Rubber Plantations, Ltd. (1917) 1 K.B. 48 (C A.) See *ante*, pp. 55-62.

[2] (1916) 2 A.C. 307 (329).

precautionary measures may, under circumstances, be found necessary to be directed against such 'business,' but that does not affect the general principle. For such measures have been found necessary to be directed against persons who are undoubtedly not "enemies."[1]

'Business' in a neutral country of such 'enemy' Companies presents more complications. Persons in charge of such 'business' or branch, residing in a neutral country, are not subject to the law of trading with the enemy; and this takes away the safeguards that exist in the case of branch or 'business' in British territory. Intercourse with [such 'business' in neutral countries, which really amounts to intercourse with the Company in the enemy country through the medium of the 'branch,' not only in theory but in fact, most certainly comes within the mischief of the rule. But suppose a British Company trading in a neutral country as well, occupied as tenant buildings and warehouses belonging to a German Company, also carrying on business in that neutral country. On the declaration of the present war between England and Germany, would the English Company violate the rule against trading with the enemy if it does not give up these tenements, which would probably ruin its business and also make it liable in damages to the German Company by a decree of the Court in the neutral country to be executed against the British Company's goods and property in the neutral country? The answer is not so easy to give. It seems that when the enemy Company's 'business' in the neutral country is something stable, having a sort of residence in that country, a *bona-fide* transaction with that branch business in affairs usually carried on by

[1] *Cf.* The Trading with the Enemy (Extension of Powers) Act, 1915. (5 & 6 Geo. 5 Ch. 98.)

that branch, is theoretically to be allowed, as not within the rule. But most certainly, if the war assumes any considerable dimensions, it will be found necessary to prohibit, either wholly or in part, such freedom of 'trading' by emergency war legislation. The Proclamation of the 9th of September, 1914,[1] and that of 8th of October, 1914, seem to bear out the views stated above. These are important as showing what the necessities of the present unprecedented struggle, this war of blockades, require and what they do not require. By the 6th paragraph of the former it is provided that "where an enemy has a branch locally situated in British, allied or neutral territory, not being neutral territory in Europe, transactions by or with such a branch shall not be treated as transactions by or with an enemy." Here freedom is restricted in case of branches in neutral countries in Europe. And it is not difficult to understand, that but for the maritime supremacy of Britain more wholesale restrictions would have been found necessary. Paragraph 5 of the latter Proclamation still further restricts the freedom, proceeding by way of prohibiting a particular kind of transaction, *viz.*, that of insurance and re-insurance by branches situated even in British, allied or neutral territory outside Europe. It may be reasonably claimed that these Proclamations proceed on the basis that, but for the restrictions such trading with branches would have been permissible in common law. But, doubtless, the alternative view may also be put forward that these Proclamations give the Crown's 'licence' to some 'trading' which would have been otherwise illegal. If the point really arises in an English Court as to whether in common law, trading with branch 'business' in neutral countries of enemy companies

[1] Trading with the Enemy Proclamation, No. 2.

is to be allowed, and necessary safeguards provided by means of restrictions introduced by special emergency legislation; or whether such trading is to be considered wholly illegal, and subjects' property and business in the neutral country affected by such a view, left to be safeguarded by the issue of special 'licence' where proper and necessary, we do not venture to hazard an opinion as to what the decision would be. These difficulties are really only an expression of the general difficulty and complication which the existence of neutral countries presents to the belligerents during war.

(3) A company with 'residence' in a neutral country may have a trading concern—a 'business' in the enemy territory. Declaration of war makes any intercourse with that 'concern' illegal in accordance with principles explained by Lord Shaw, which we have already referred to more than once. But this does not make the Company itself, controlled from a neutral country, an 'enemy.' Here again special legislation might become necessary to prohibit trading even with the Company itself with respect to its trading outside the enemy territory, as it has actually been found necessary more than a year after the commencement of the present war on the score of "enemy associations."[1] But that does not affect the question of general principles.

(4) A Company's seat of control may change during war, just as a natural person may change his residence. It may shift from the enemy country to British territory or from British territory to the enemy country. And this change will, according to the view explained, affect the character of the Company. In this way an enemy Company may leave its enemy character, and a Company which was

[1] The Trading with the Enemy (Extension of Powers) Act, 1915 (5 and 6 Geo. 5 Ch. 98). (23rd December 1915.)

not of enemy character may assume one. But, we submit, that to bring about this change of character an actual shifting of the central control is essential. This view is attacked in Lord Parmoor's judgment in the Daimler Company's case,[1] in criticising the opinion expressed by Lord Wrenbury (then Buckley L.J.) in his dissentient judgment when the case was before the Court of Appeal. Lord Parmoor says, "I find it difficult to accept the conclusion that after the outbreak of war, the thoughts, wishes, or intentions of the Company are the thoughts, wishes, or intentions of Germans resident in Germany. The effect of the outbreak of the war is to suspend, as from that date and during the war, all rights of the enemy directors or corporators to take any part in the management and direction or control of a British Company carrying on business in this country." We think, with the very greatest respect, that what lurks beneath this opinion is the idea that unless the Company itself can be made to cease to be an 'enemy' altogether, any transactions with its 'business' in British territory would be illegal. This is an idea which we have tried to show to be groundless in our discussion of item No. 2 above.

We shall bring this discussion, and this chapter to a close by noticing a case, illustrating this change of the seat of control from one country to another, during the present war. This is the case of Société Anonyme Belge Des Mines D'aljustrel (Portugal) *v.* Anglo-Belgian Agency Limited.[2] The Appellant was a Company incorporated in Belgium with its head office at Antwerp, and it possessed and worked some mines in Portugal, which was apparently the principal business it carried on. On the irruption of the German army into Belgium, the Company's business

[1] (1916) 2 A.C. 307 (331-352).

[2] (1915) 2 Ch. 409 (C.A.)

at Antwerp was closed, and the books were removed to London, whence the business was wholly controlled,—the mines being worked in Portugal and the produce sold in England and France. Some of the Directors were in England, but the Chairman was still at Antwerp. The question arose, under proceedings which it is not relevant to explain, whether this Company became an 'enemy' Company, when Antwerp and the major portion of Belgium came into the effective military occupation of Germany, which would place that portion on the same status as enemy territory for the purpose of the law of trading with the enemy.[1] It was held that the Company was not an 'enemy,' either under any of the Statutes or Proclamations or under the common law. It was pointed out that the Company was incorporated in Belgium and not at Antwerp, and that friendly territory in hostile occupation does not become an enemy country, though the rules regulating trading with the enemy apply to it as they apply to an enemy country. Pickford L. J. also pointed out that the whole of Belgium was not yet in German occupation. But on the principles, we have tried to explain, these considerations are practically irrelevant. The presence of the seat of control in London settles the status of the Company as one not of enemy character. Had this continued at Antwerp after the German occupation of the city, the Company would certainly have become an enemy. And is not this in touch with the reality of things?

In concluding we cannot get over the temptation of noting that the trial of this case is calculated to gladden the hearts of those who would almost give anything for securing 'expedition' in administration of justice. The judgment of the Division Court was delivered by Younger

[1] *Cf.* The Trading with the Enemy (Occupied Territory) Proclamation, 1915 : dated 16th February, 1915.

J., after a very quick trial, on the morning of the 29th July. Appeal was lodged, and heard by the Court of Appeal on the same day afternoon, and judgments were delivered on the next day! At the conclusion Lord Cozens-Hardy M. R. said, with justifiable pride: "I think this is an instance of the greatest expedition which any Court of Appeal can show. The case has been tried by a Judge of first instance and the appeal has been heard and disposed of in this Court within twenty-four hours." But we cannot also fail to notice that it was the parties, to what was really a friendly test case, who hastened matters; and Younger J. actually complains of the hurry!

But this expeditious decision of the Court of Appeal was not without effect in quickly adding a Proclamation to an already confused mass. The view that friendly territory in hostile occupation does not become an enemy country for the purpose of giving a company incorporated according to its laws an enemy character (under clause 3 of Proclamation No. 2 of September 9, 1914) frightened His Majesty's Government. And a Proclamation, dated September 14, 1915, declared that "for the purpose of the Proclamations for the time being in force relating to Trading with the Enemy, the expression 'enemy' notwithstanding anything in the said Proclamations is hereby declared to include, and to have included ("an odd retrospective provision" as Scrutton L. J. says in the case we shall presently notice) any incorporated company or body of persons (wherever incorporated) carrying on business in an enemy country or in any territory for the time being in hostile occupation." We need hardly stop to point out that the Proclamation introduces all the confusion and difficulties which we have seen result from attempting to make the place of carrying on of business by a person, natural or artificial, the test of his enemy

character: or that it would stop all British trading with neutral companies in neutral countries if the latter also happen to do business with the enemy country. And it is not difficult to see who would suffer most, Britain or her enemies!

One result, certainly not the strangest possible, of the application of this Proclamation is illustrated by the recent decision of the Court of Appeal in Central India Mining Company *v.* Société Coloniale Anversoise.[1] The former, the plaintiff company, incorporated in India with its registered office in Bombay, contracted with the latter, incorporated in Belgium with its registered office in Antwerp, in January, 1914, to sell large quantities of manganese ore deliverable alongside steamer in Bombay, the delivery to be completed in 1917. In October, 1918, the plaintiff company sued for a declaration that the agreement of January, 1914, was since February 16, 1915, abrogated and was of no force and effect. The date mentioned was that of Trading with the Enemy (Occupied Territory) Proclamation, 1915, already quoted, which declared 'proclamations for the time being in force relating to trading with the enemy applicable to territory in hostile occupation as they applied to an enemy country,' the German armies having entered Antwerp on October, 9, 1914. The evidence in the case showed that when the German armies were threatening Antwerp the managing director and another director of the defendant company (who were the only two amongst the directors who were not in the already occupied parts of Belgium) removed all the company's goods and cash to England; and the managing director went over to England himself with such of the company's books as were necessary to carry

[1] (1920) 1 K. B. 753.

on the business, but not the register of shareholders and the minute books. He there carried on business at an office in London in his own name, but for the benefit of the company, and did not return to Belgium until after the armistice. But the evidence also showed that during the German occupation, meetings of the Board of Directors were held in Brussels on various dates at which formal business was transacted, so as to comply with Belgian law and keep the company alive. The company also collected and paid debts in order to prevent the German authorities from winding up the company and investing the uncalled capital in German war loan. The plaintiff company claimed that these doings in occupied Belgium constituted 'carrying on business in territory in hostile occupation' within the meaning of the words of the Proclamation of September 14, 1915, and made the defendant company an enemy any executory contract with whom was dissolved as being illegal. The Court of Appeal (Bankes L. J., and Duke P., the latter with regret) agreed with the trial judge Rowlatt J., that this was so. Scrutton L. J. dissented, and pointed out[1] that the contract might have been carried out without anything being done in Belgium at all. This brings out once again, whether the learned judge's dissent was right or wrong, the unsatisfactoriness of the place of business as a test of enemy character. As to the technical question in the case, *viz.*, whether the acts proved amounted to "carrying on business" in Belgium, the opinion of a higher tribunal may not be unreasonably invited. But what is of more interest to us is to ask what would be the decision in common law as laid down in the Daimler Company's case.[2] Perhaps the

[1] (1920) 1 K. B. 753 (771).

[2] (1916) 2 A. C. 307.

better view would be that inspite of the formal meetings of the directors and their doings in Belgium, the real and effective centre of authority of the company was not in Belgium, but in London, and the company was not an enemy in common law.

CHAPTER V

Trading and its Prohibition

The subject matter of this chapter has, to some extent, been already touched upon, in more or less detail, in the course of the last four chapters. We shall try to avoid repetition so far as is consistent with a systematic presentation of the subject; and shorten our discussion where the principle of the law to be stated has already received sufficient attention.

What are the transactions which, under the name of 'trading,' the law of trading with the enemy seeks to prohibit?

In the first place, it is clear that the parties to these transactions are, on the one hand, persons, natural or artificial, who are under the protection of the State and therefore amenable to its laws, and on the other hand those who are called 'enemies,' as explained in the last two chapters. Undoubtedly this does not carry us very far. But let us proceed.

In the next place, this class of transactions is to be distinguished from another class with which it may easily be confused. These latter are transactions designated by the expression 'adherence to the enemy.' This is constituted by act or conduct on the part of the subject and persons under protection, whose object is to assist the enemy state in the prosecution of the war against the Crown. A person who gives such 'adherence' does not violate the rule against trading with the enemy, but commits the far graver offence of 'treason,' and is liable to be

punished as a traitor.[1] The assistance to the enemy State may take the shape of resource and intelligence, rendering financial or other material help and conveyance of useful information. And it is also these that the rule against trading with the enemy seeks to prevent. But the object of persons and transactions against whom this rule is directed is not aiding the enemy State, but individual personal profit. More often than not, it is certainly hoped and expected that no benefit would accrue to the enemy State. The state of war is simply sought to be disregarded as it presses hard on personal gain. Whereas the very object of the 'traitor' is to help the enemy State. If he wishes for any personal gain, it is through such help. Sometimes the boundary line between the two classes may be very thin, but generally it is well-defined.[2]

Coming now to the question as to what these transactions affirmatively are between persons already described, if any general answer is to be attempted, some such statement becomes inevitable :—*viz.*, that these are transactions which involve any of the risks as described in Chapter 2, which is the policy of the law of trading with the enemy to prevent.

Stated in this bald, abstract fashion it sounds like speaking in a circle. But the main object of this chapter is to give form and shape to this vague outline; to follow the abstract and general principle in its manifestations in concrete and individual applications. To this task we now proceed.

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[1] *Cf.* Proclamation, dated 5th August, 1914, Prohibiting Financial and other Dealings with the German Government.

[2] In Daimler Company's case (1916) (2 A.C. 307) Lord Shaw states that the common law of trading with the enemy forbids trading with the 'Enemy Power' (p. 329). According to the Proclamation just referred to, such trading would be 'treason.'

The first point to be noticed is that 'trading' is not confined to only what may be called 'Commercial transactions,' according to the dictionary meaning of that term. As has been already said, in the law of trading with the enemy, the term 'trading' is, like the term 'enemy' a technical term of art. It includes intercourse which may not be by way of commerce or business. For the rule against trading with the enemy aims at prohibiting all unregulated intercourse between residents of the two belligerent countries; as one of the dangers which it guards against is the danger of the leakage of intelligence to the enemy State. It will be remembered[1] that Lord Stowell in The Hoop[2] considered commercial intercourse to be dangerous because of the likelihood of this conveyance of intelligence as a result of such intercourse. But occasions have scarcely arisen for forbidding intercourse, not commercial, under the rule against trading with the enemy, for when not commercial it is more likely than not to be treasonable. However, the doctrine recently laid down and applied[3] that an enemy shareholder of an English Company is not entitled to exercise his right of voting at its meetings during a state of war, may perhaps be cited as an instance of prohibition of non-commercial intercourse. In the case cited, a German Company, which held a large number of shares in an English Company offered to vote through a proxy at a meeting of the latter for the election of a number of Directors. These votes were rejected by the Chairman of the meeting. The suit was for declaration that the persons elected

[1] *Anti*, pp. 17-18.

[2] (1799) 1 C. Rob. 196.

[3] Robson v. Premier Oil and Pipe Line Co., Ltd. (1915 2 Ch. 124 (C.A.).

Directors after the rejection of the said votes were not validly elected. Sargant J. held that these votes of an enemy shareholder were rightly rejected and his decision was upheld by the Court of Appeal. It was pressed in argument that what the rule against trading with the enemy prohibited was commercial intercourse, may be in a wide sense; but that such exercise of right of voting could not be properly described as commercial intercourse or trading in however wide a sense. Sargant J. refused to accept the first part of the contention which was the foundation of the argument, and held that "it was not merely commercial intercourse but all intercourse with an alien enemy that was forbidden." The passage in which the Court of Appeal also rejects this contention has already been quoted in the Second Chapter.[1] Shortly after the outbreak of the present war Sir Samuel Evans, President, examined the older authorities, and reached the same conclusion.[2] As to the doctrine itself, refusing enemy shareholders their right of voting in an English concern during war, it has the sanction of most of the learned Lords who decided the Daimler Company's case.[3]

Passing on now to commercial transactions proper, the most important thing to notice is, that not only that expression must be taken in a very wide sense but that all acts and relations which would involve, directly or indirectly, any such transactions or intercourse are also forbidden. How wide is the meaning to be attached to the term 'Commercial transaction,' and what diverse acts and conduct are to be interpelled if anything involving such transaction is to be forbidden,

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[1] *Ante* p. 20. The passage is quoted with approval by Lord Dunedin in his Tinto Company's case (1918) A. C. 260 (268).

[2] The Panariellos: 84 L.J. (P.) 140.

[3] (1916) 2 A.C. 307 (315, 330, 336, 352).

may be vividly realised by glancing through the ten paragraphs of "prohibitions" against which 'all persons resident, carrying on business or being in the British Dominions' are warned in the Proclamation of 9th September, 1914.[1] It is not necessary to reproduce this list of "prohibitions." They range from direct payment of money to the enemy and trading with him, through turns and twists of the diverse ways by which modern commerce is carried on, to the innocent-looking obtaining of goods from the enemy country without making any payments. But what must be pointed out is, that this list was certainly meant to enumerate what would be illegal in common law, and it could not have been intended to create new heads of "prohibitions," which do not come under the common law rule."[2] For at the date of the Proclamation, there was no Parliamentary sanction which could give any such authority to an order in Council.

Bearing this in mind, we may cite as good illustrations of the very far-reaching denotation of 'commercial transaction' in the law of trading with the enemy, two cases of criminal indictments based on two items of "prohibitions" respectively, enumerated in the above Proclamation.

The first is the case of Rex *v.* Kupfer,[3] where a conviction by Rowlatt J. was upheld by the Court of Criminal Appeal. The charge was based on the first prohibition enumerated, *viz.*, "not to pay any sum of money to or for the benefit of an enemy." And it was held that a partner, resident in England, of a partnership which carries on business both in England and Germany violates the above prohibition, if after the declaration of war between the two

[1] The Trading with the Enemy Proclamation, No. 2, see section 5.

[2] *Cf.* per Warrington L. J. in Tingley *v.* Müller: (1917) 2 Ch. at pp. 154, 167.

[3] (1915) 2 K. B. 321 (C.C.A.)

countries, he pays to a neutral a debt due to him from the partnership, in respect of transactions which took place between the neutral and the partners resident in Germany. Such payment was held to be "for the benefit of an enemy," as its effect was to extinguish the obligation of the partners resident in Germany to pay the debt to the neutral, and to that extent the resources of individuals in the German Empire were augmented or protected, and those of individuals in Great Britain diminished. Certainly a play of dialectic skill of which no disciple of Thomas Aquinas need have been ashamed! In delivering the judgment of the Court of Criminal Appeal, Lord Reading, C. J. says, "In our judgment these words," *i.e.* "for the benefit of,' "were deliberately introduced for the purpose of preventing devices, tactics, and various means by which mercantile houses might seek, but for those words, to make payments indirectly notwithstanding that there is an express prohibition of a direct payment. It was doubtless considered, that in making this proclamation it was necessary to cover that ground and to throw the net wide in order that there should not be this means of evading the law and therefore of assisting the enemy by adding to or protecting his resources."

The case is undoubtedly a good illustration of the proposition that all transactions which may tend to increase the resources of the enemy state or decrease those of one's own State, in however indirect a way, are prohibited. But the decision itself we cannot pass without a word of comment. With great respect, it appears to us that it is not easy to follow the reply made by the Court of Criminal Appeal to the point urged in favour of the prisoner, *viz.*, that as he was one of the partners of the firm he also was liable for the debt paid, and indeed, as the partnership stood dissolved on the declaration of war by the operation

of the law of trading with the enemy itself, he was liable for the full amount as an ex-partner; and how could a man be criminally liable for doing what he could be legally compelled to do. The answer made by Lord Reading C.J., who delivered the judgment, is two-fold. First, it is said, that there was no legal process, actual or threatened against the prisoner, nor even any demand by the neutral creditor so far as he was concerned: and secondly, it is pointed out that even after the declaration of war the intercourse between the prisoner and his ex-partners, resident in the enemy country, did not cease, and the payment was made by him on their instruction, when there was no subsisting relation of partnership. But on what principle can the criminal Court of the land order a person to desist from making a payment on pain of losing his liberty, when its Civil Court, on being moved by the creditor, would certainly compel him to make the payment, together, in all probability, with the costs of the action, for not making the payment without it. And would not this diminish the resources of the inhabitants of Great Britain by the cost of the suit, over and above the amount of the debt! And, in the second place, if the prisoner was in communication with his partners in Germany after the declaration of war, that laid him open to an indictment on that intercourse, but this was not the subject matter of the charge against him. Certainly an act not illegal in itself does not become so, because done at the bidding of any particular person. It seems as if this decision has overreached even the very far-flung 'net' of prohibited 'trading' in the law of trading with the enemy.

The second case we mean to cite is Rex *v.* Oppenheimer and Colbeck,[1] where also the Court of Criminal Appeal

[1] (1915) 2 K.B. 755 (C.C.A.)

upheld the conviction. The indictment was based on the seventh item of the list of "prohibitions," which, amongst other things, forbade "directly or indirectly to supply to or for the use or benefit of, or obtain from, an enemy country or an enemy any goods, wares or merchandise." The prisoner, a German by birth but naturalised as a British subject, had a business in London of lithographic printing, for the purposes of which he ordered designs from a German firm. According to the contract between him and the German firm on his ordering a certain number of copies of each design he was entitled to receive free of charge a transfer of that or some other design. At the time of the outbreak of the war between England and Germany there was a large number of "transfers" in existence with the German firm which would in the ordinary course have been sent to the prisoner in London. After the declaration of war, the prisoner obtained delivery in England of a certain number of these "transfers," and was charged with violating the Proclamation forbidding the 'obtaining of any goods or merchandise from the enemy country.' It was urged on his behalf that the 'obtaining' which was forbidden was obtaining by way of trade, and that nothing can be said to have been obtained by way of trade for which no payments have to be made. The Court of Criminal Appeal said, "Where goods are supplied from the enemy country under a commercial contract, or in consequence of commercial relations, or as a result of commercial intercourse between the enemy and the British subject, that amounts to obtaining goods within the meaning of the Proclamation." In the Court below Atkin J. had broadly laid down that the prohibition against obtaining goods from the enemy applied to a case where the goods were the property of the person obtaining them. And this view is indeed supported by the words of Willes J.

in Esposito *v.* Bowden,[1] where that very learned Judge says, "There is very high authority for saying that the removal of merchandize, even though acquired before the war from the enemy's country, after knowledge of the war, without a Royal license, is generally illegal." We may note that the High Court of Madras follows this wider interpretation of the Proclamation, in a case[2] arising out of a prosecution under Ordinance No. VI of 1914[3] of the Governor General of India, which extends to India the Royal Proclamation of 9th of September.

We may also notice here a case before the High Court of Calcutta,[4] where the prosecution was based on the last clause of the same seventh item which prohibits 'direct or indirect trading in, or carrying any goods, wares or merchandise destined for or coming from an enemy country or an enemy.' The prisoner consigned from Calcutta, before the outbreak of the war, a case of mica to a German firm at Cologne, *viâ* Antwerp. The war intervening, the ship carrying the goods did not proceed beyond London, and the case of mica was taken charge of by a London firm at the request of the prisoner. After the Proclamation of 9th September had been extended to India by the Ordinance of the Governor General, the prisoner sent instructions to the London firm to send the goods to his agent in Genoa, and to this agent to deliver to the German firm on payment. He was charged with 'trading in goods destined for an enemy country' on the basis of these instructions. The goods however were not dealt with by the English firm

[1] (1857) 7 El. & Bl. 763 (785).

[2] (1916) Hooper *v.* King Emperor: Indian Law Reports, 40 Madras Series, p. 34 (47, 56).

[3] The Commercial Intercourse with Enemies Ordinance, 1914.

[4] (1915). Indar Chand *v.* Emperor: Indian Law Reports, 42 Calcutta Series, p. 1094.

as directed by the prisoner as export of mica to Italy from England had been prohibited. It was urged for the prisoner (1) that the 'instructions' did not amount to trading in goods, and (2) that when the instructions were issued the goods were not destined for Germany. The two learned Judges who heard the appeal in the first instance agreed that the instructions amounted to 'trading,' but differed on the second point. One of the learned Judges held that after the goods had reached London, they were no longer destined for Germany as export of mica from England to Italy, amongst other countries, had been prohibited. The other learned Judge was of opinion that as the owner of the goods intended them to go to Germany, that made the goods 'destined for' Germany, for "the phrase cannot refer to the destination before the trading takes place, but to what will be the destination as the result of the trading." The third learned Judge to whom this difference of opinion was referred for final decision thought the matter "not altogether free from doubt", but agreed "on the whole" with the first opinion that after reaching London the goods lost their enemy destination, and did not regain it by any act of the prisoner. It is difficult not to feel the force of the argument of the learned Judge whose view was overruled. Why is it that the goods must be held to have lost their enemy destination on reaching London? The goods still belonged to the accused (at least this was assumed for the purposes of the argument), and he meant them to be sent to Germany; and to him London was only an intermediate station. All the learned Judges agreed that "destined for" meant "intended for;" and where could this 'intention' reside except in the mind of the trader or consignor? But it seems that much of the difficulty was really due to the fact that 'trading in goods destined for an enemy country' is not the proper description

of the act done by the prisoner. His act was really an 'attempt' to 'supply goods to an enemy country or an enemy.' By 'trading in goods destined for an enemy country', intermediate transactions by third parties, between the original consignment and final receipt by the enemy or in the enemy country, and in furtherance of such object, are meant to be prohibited. It would have been a proper description of the act of the English firm if it had taken charge of the goods knowing the intention of the prisoner. From this standpoint the meaning of the expression becomes clear. It is dealing in any way with goods which another intends for an enemy country, and, of course, in furtherance of such intention. But the prisoner's act was pure and simple attempted trading with the enemy by supplying him with goods and receiving price. The difficulty was that 'attempt' was not made an offence by the Proclamation, though such 'supply' was forbidden in the first part of the seventh paragraph of the "prohibitions." In England this omission has been supplied by Section 10 of the Trading with the Enemy Amendment Act, 1914,[1] whose operation makes 'attempts' of acts prohibited by the Proclamation of 9th of September (indeed of all acts prohibited by any Proclamations, Statutes or Common Law) also criminal offence. In the absence of such a provision, a clause meant for a different purpose was strained to an use for which it was not designed, and not unnaturally difficulties resulted.

The illustrations we have given are sufficient to show that the wide meaning given to 'Commercial or business intercourse' is very wide indeed. Let us now pass in review the importance of the concrete results that have been reached by prohibiting 'trading' in this wide sense.

[1] 5 Geo. 5, Ch.12.

It is perhaps needless even to mention that no fresh business relations or contracts can be entered into with the enemy during war. But contracts which have been entered into before the war, but remain unperformed in whole or in part at the declaration of war, cannot also generally speaking, be carried any further into execution, but stand dissolved if such further progress involves any intercourse with the enemy in this wide sense.[1] Thus it has been held that a contract for purchase and sale of goods to be shipped to what became on declaration of war an enemy port, stood dissolved on the outbreak of war, the goods remaining in, an enemy vessel lying in a neutral port; and that the purchaser was justified in refusing to pay in exchange for the shipping documents, in accordance with the contract, as it would be 'trading in goods destined for the enemy country.'[2] And further, that such a contract would stand dissolved even if the goods were not destined to the enemy country, but the price was contracted to be paid in exchange for enemy bill of lading or enemy policy of insurance; for these documents could not be enforced without entering into contractual relations with the King's enemies.[3]

Passing from such more or less isolated acts of contract, we find that more permanent business relations between persons, firms, or Company, which abound in modern commerce, also stand dissolved, on declaration of war, if the existence of such contract would involve intercourse with the enemy or would tend to increase the

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[1] See the statement of the law by Warrington L.J. in Halsey *v.* Lowenfeld: (1916) 2 K.B. 707 (C.A.) at p. 716.

[2] Duncan, Fox & Co. *v.* Schrempft & Bouke: (1915) 1 K.B. 365; (1915) 3 K.B. 355 (C.A.) Compare I.L.R. 40 Bombay, p. 11.

[3] Arnhold Karberg & Co. *v.* Blythe, Green, Jourdan & Co. and another case tried with it: (1915) 2 K.B. 379; (1916) 1 K.B. 495 (C.A.)

resources of the enemy country, or diminish or prevent from increasing the resources of one's own country. Thus a contract between an English Company and some business men in Germany, by which the former was to sell to the latter for a period of ten years from 1910 to 1919, the whole of the production of zinc concentrates at the English Company's mine in Australia, and to sell to no one else during that period, was held dissolved on the declaration of war between England and Germany; as the continued existence of the contract would involve commercial intercourse with the enemy and would also be detrimental to the interests of the country by making it impossible to the English Company to make use of its resources for the benefit of the country and thus benefiting the enemy country.[1]

Is the contract taken out of the rule against trading with the enemy if the parties to it with a provident eye to future possibilities provide in the contract itself that in the event of war between their respective countries all rights and duties under the contract would remain suspended during the war to be resumed within a reasonable time after peace? It is not difficult to see that such a suspensory clause though it may save the contract from attack on the ground of involving intercourse with the enemy during war, is unable to shield it from the charge of tendency to diminish the available resources of the state during war, and possibly to augment those of the enemy on the guarantee of the advantages under the contract available immediately on the termination of the war. The question was discussed by the House of Lords in the case of Rio Tinto Company, Limited.[2] An English

[1] Zinc Corporation, Limited v. Hirsch: (1916) 1 K.B. 541 (C.A.) Compare, I.L.R. 40 Bombay, p. 570.

[2] (1918) A. C. 260.

Company of that name contracted on various dates prior to the outbreak of the war to sell to three German Companies by instalments extending over a number of years large quantities of cupreous ore from mines it owned in Spain. Each of the contracts contained a suspensory clause providing that if, among other things, owing to war the seller should be prevented from delivering the ore according to contract the obligation should be suspended during its continuance and for a reasonable time afterwards, the buyers also having a corresponding suspension in their favour of their obligation to receive delivery and pay. There was no provision, as in the case of Zinc Corporation *v.* Hirsch, preventing sale to others during the period of the contracts. When war was declared some of the contracts had been partially executed, the rest were wholly executory. The English Company by sections under the Legal Proceedings against Enemies Act, 1915, sought for declarations that the state of war between Great Britain and Germany abrogated all the contracts on August, 4, 1914, as offending against the rule of trading with the enemy. The German companies contended that the suspensory clause took the contracts out of the rule making its reasons inapplicable to them. The House decided that if 'war' in the suspensory clause meant war between Great Britain and Germany the clause itself would be void as against public policy underlying the rule against trading with the enemy. "But for it," said Lord Dunedin,[1] the contract would immediately end, by it the contract is kept alive, and that not for the purpose of making good rights already accrued, but for the purpose of securing rights in the future by the maintenance of commercial relation in the present. It hampers the trade of the British subject, and through

[1] (1918) A. C. 260.

him the resources of the Kingdom. For he cannot, in view of the certainty impending liability to deliver (for the war cannot last for ever), have a free hand as he otherwise would. We must either keep a certain large stock undisposed of, and thus unavailable for the needs of the Kingdom, or, if he sells the whole of the present stock, he cannot sell forward, as he would be able to do if he had not the large demand under the contract impending. It increases the resources of the enemy, for if the enemy knows that he is contractually sure of getting the supply as soon as war is over, that not only allows him to denude himself of present stocks, but it represents a present value which may be realised by means of assignation to neutral countries."[1] Lord Parker's statement of the rule of public policy is seemingly different. "It is not permissible by English Law," says the learned Judge,[2] "for a subject of the Crown to contract with a foreigner that in case of war between this country and the state of which the foreigner is a subject, the latter shall be indemnified against or be relieved from or receive compensation for a loss which he would otherwise suffer by reason of the war or of anything done in the prosecution of the war." But it is obvious that this rule is only derivative, and when the ultimate principle is sought it can only be found in the risk of diminishing the resources of one's own country and of increasing those of the enemy. In addition to this rule of public policy, Lord Sumner takes a bolder line and put his judgment against the 'suspensory clause' on grounds more drastic. "If upon public grounds," asks the noble Lord,[3] "on the

[1] See per Lord Atkinson at p. 279; and per Lord Sumner at p. 290.

[2] (1918) A. C. 260 (281).

[3] (1918) A. C. 260 (286).

outbreak of war the law interferes with private executory contracts by dissolving them, how can it be open to a subject for his private advantage to withdraw his contract from the operation of the law and to claim to do what the law rejects, merely to suspend where the law dissolves?" Again, "To say that for the purpose of preventing such intercourse the law generally determines stipulations which involve commercial intercourse between enemies, but when the parties have agreed not to hold any such intercourse is content to leave it to them, would indeed be rash."[1] As is evident, this view assumes and proceeds on the propositions that a state of war avoids *all* executory contracts, at least *all* executory trading contracts, between persons in belligerent countries. But the proposition is one which cannot be said to have been accepted by the House. Lord Dunedin openly doubts it,[2] and Lord Parker reserved his opinion for a suitable occasion when the point arose in some concrete form.[3] And if a distinction has to be drawn between executory contracts which are, and such contracts which are not, dissolved by the war the principle of demarcation will ultimately be found only in public policy as formulated by Lord Dunedin.

The days before the decision of the House of Lords in Rio Tinto Company's case an exactly similar 'suspensory clause' came up for consideration before McCardie J.[4] and was declared by him void as against public policy as supporting the enemy during the war. The learned reader will read with pleasure the learned Judge's

[1] *Ibid*, p. 288.

[2] *Ibid*, p. 269.

[3] *Ibid* p. 284.

[4] Naylor, Benzon & Co. v. Krainische Industrie Gesellschaft (1918) K. B. 331.

criticism of the dictum that courts cannot invent a new head of public policy.[1]

Proceeding a step further, we shall find that contractual relations, intended to be still more permanent, which give to the parties to it something like 'status' with respect to each other, are also attacked. Thus it has been held that a partnership between an English Company resident in England and a German Company resident, in Germany, with respect to a business carried on in England was dissolved on August 4, 1914, by the outbreak of war. And an agency of the English Company in England, with respect to another business of the German Company in Germany, was also held to have terminated by the same event.[2] In the course of his judgment in the case cited, Swinfen Eady L.J. says,[3] "No partnership can exist between an enemy Company resident in Germany and an English Company resident here. If two partners are resident in two different countries, and war breaks out between those countries, the partnership is determined and put an end to by the war: Evans *v.* Richardson,[4] Griswold *v.* Waddington;[5] Lindley on Partnership, 8th Ed., pp. 87; 88; Partnership Act, 1890 (53 & 54 Vict. C. 39), S. 34. Similarly the contract of agency was terminated by the war. It was a trading contract and war dissolves all contracts which involve trading with the enemy; Esposito *v.* Bowden."[6]

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[1] *Ibid*, p. 342.

[2] Hugh Stevenson & Sons, Limited *v.* Aktien-Gesellschaft Für Cartotonnagen—Industrie: (1917) 1 K.B. 842 (C.A.)

[3] *Ibid*, p. 845.

[4] (1817) 3 Mer. 469.

[5] (1819) 16 Johnson, Sup. Ct. New York 438.

[6] (1857) Ell. & Bl. 763 (784).

The words quoted are very general. But it seems that some distinctions must be made. The reason why such relations are held to be dissolved by the war is that they involve intercourse with the enemy. But if in a particular case the relation is such that it does not and need not involve any intercourse with the enemy,—any chance of intelligence or resource passing from one party to the other, or of any diminution of the available resources of the State,—it is difficult to see why the existence of even such relationship also must be held to be illegal. In the case of agency a distinction has been made in the recent case of Tingley *v.* Muller,[1] where the Court of Appeal [2] laid down that an irrevocable power of attorney to sell land in England and give receipts for the purchase-money was not avoided by the donor of the power subsequently becoming an alien enemy. In that case a German subject resident for many years in England, being about to proceed to Germany, after the declaration of war, under a Government permit, executed a power of attorney by which he appointed his solicitor his attorney to sell his leasehold house in England and to execute such transfers and deeds as were necessary. The power of attorney was made irrevocable for twelve months. Under this power the Solicitor sold the house to the plaintiff at a time when it was inferred that the principal had reached Germany and taken up his residence there and was thus an 'enemy.' The plaintiff sought to rescind this agreement for sale on the ground that it has been dissolved by the act of the defendant in becoming an alien enemy, and that the power of attorney had also ceased to be

[1] (1917) 2 Ch. 144 (C.A.)

[2] Lord Cozens-Hardy M.R.; Swinfen Eady, Bankes, Warrington, L.J.J. and Bray J., Scrutton L.J. dissenting.

effective for the same reason. But his contentions were overruled. Lord Cozens-Hardy M.R., said,[1] "But can it be said that the power of attorney was necessarily revoked when Müller became an alien enemy? I think not. It is true that most agencies, involving as they do continuous intercourse with an alien enemy, are revoked, or at least suspended. But such considerations have no bearing upon a special agency of this nature." And Swinfen Eady L.J. pointed out[2] that the making of this contract did not involve any intercourse with the enemy; and the completion of the contract and conveyance of the property did not necessitate any such intercourse, as the irrevocable power of attorney fully empowered the Solicitor to convey property and receive the purchase-money without communicating further with the defendant; and as the purchase-money would be paid to the latter not during war but after the restoration of peace, no 'trading' with the enemy was involved in the whole process.

The case of partnership would seem to be hopeless on the authorities. In M'Connel *v.* Hector[3] decided as far back as 1802, a commission of bankruptcy founded on a petition of a British subject resident in England for a debt due to himself and his partners, also British subjects, but residents and carrying on trade in the enemy country was held not to be maintainable. Evidently the firm was treated as an 'enemy.' And if so the relationship between residents of the belligerent countries must stand dissolved, as its continuance becomes illegal. But the reason why this should always be so is not quite apparent. When the business of the partnership is such that it

[1] (1917) 2 Ch. 144 (156).

[2] *Ibid*, p. 160.

[3] (1802) 3 Bos. and Pul. 113.

involves commercial relations between the two countries, and one set of partners reside in the enemy country for the purposes of carrying on such transactions, when in short, the partnership business itself is based on the intercourse between the belligerent countries, *e.g.*, selling in one goods manufactured in another, there might be reasons for its dissolution on the outbreak of war. And if closely looked into it will perhaps be found that most cases where partnerships have been declared dissolved were of this nature. But why should a partnership whose business is carried on within the British territory but one of whose partners was residing in the enemy country at the declaration of war, say, for purposes of health, be held dissolved by the event of the war, is not at all easy to discern. Why should not the remaining partners be allowed to carry on the partnership business, of course without the assistance or help of the 'enemy' partner? If something in the constitution of the partnership makes its business impossible without intercourse with the partner in the enemy country, the partnership no doubt collapses, but not because of any direct attack from the rule against trading with the enemy. Indeed even in the former class of partnerships why should the war *ipso facto* dissolve them. No doubt their business must be practically suspended during war, an event of uncertain duration. And if under such circumstances any of the partners desire to terminate the relation the partnership may be dissolved. And the cases which have arisen for dissolution are mostly of this nature. But why, if all the partners are willing, should not the partnership be allowed to exist, in a state of suspended animation, as it were, during the war, to be roused into activity at its close? Why may not the partners be left alone to tide over the difficulty as best as they could, without committing any actual act of intercourse with the enemy?

But as we have said the cause of partnership is apparently hopeless on the authorities. When the decision of the Court of Appeal[1] in Hugh Stevenson and Sons, Ltd. *v.* Aktiengesellschaft Für Cartonnagen Industrie was affirmed by the House of Lords[2] it was admitted by the parties and assumed without discussion that the declaration of war dissolved the partnership between English and German partners,[3] though it does not appear that the partnership business involved any transactions with Germany. And in the still later case of Rodriguez *v.* Speyer Brothers[4] before the House of Lords the parties and the court everybody proceeded on the basis that the war *ipso facto* dissolved a partnership between six persons, four of whom were British subjects resident in Britain, one an American citizen living in America, because the sixth was a German resident in Germany. The partnership business was that of banking carried on in London, the leading member of the firm living there, and it is not stated that the business either necessarily, or in the ordinary course, involved any intercourse with Germany.[5]

This leads us to the applications of the doctrine that enemy property is not confiscated by the declaration of war, but allowed to remain vested in the enemy.[6] From this it necessarily follows that persons in charge of the management of such property before the war are allowed to continue to manage it after its declaration, subject of course to

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[1] (1917) 1. K.B. 842 (C.A.).

[2] (1918) A.C. 239.

[3] *Ibid* see pp. 243, 246, 257.

[4] (1919) A.C. 59.

[5] See for statement of facts the opening of Lord Finlay's judgment, pp. 64-65.

[6] See per Lord Parker in Daimler Company's case; (1916) 2 A. C. 307 (347).

such guidance and regulations that the State may find necessary to issue and lay down on the occasion of any particular war. A considerable portion of the legislation and orders in Council during the present war relates to such regulations [1]; from which conclusion must be drawn, as it has been drawn by Swinfen Eady L. J. in Tingley *v.* Müller[2] that "a contract entered into in England with a person here who simply holds or manages property belonging to an enemy is not unlawful." In the passage referred to in Daimler Company's case, Lord Parker says, "I see no reason why the Trustee of an English business with enemy cestuis que trust should not during the war continue to carry on the business." We shall only stop one moment to ask why on behalf of an enemy partner, the partners resident in British territory—and they are mutually principals and agents—should not continue to carry on the partnership business, which may have absolutely no connection with the enemy country.

As the enemy has not his property confiscated because of the war it is almost obvious that he must hold it subject to all its obligations. Thus he cannot plead that his liability to pay rent under a lease made before the outbreak of war, is either extinguished or suspended by it, as regards rent accruing due during the war. A contract of lease then is not avoided by war between the countries of residence of the lessor and lessee respectively. There is no reason to suppose that the enemy lessor would be in a worse plight. The rents, certainly, cannot reach him during war, but his agent in British territory will continue to receive and keep them for him, subject of course to any

[1] See specially:—The trading with the Enemy Amendment Act, 1914 (5 Geo. 5, Ch. 12); The Trading with the Enemy Amendment Act, 1915 (5 and 6 Geo. 5, Ch. 79).

[2] (1917) 2 Ch. at p. 160.

enactments that may be passed during the war for regulating such transactions.

On an application of the same doctrine has been rested the decision that when partnership with an enemy is dissolved by the war, the enemy partner is entitled to a share of the profits made after the dissolution by the English partner carrying on the business with the aid of the enemy partner's share of the capital; or he may claim interest in the alternative.[1] To disallow profits or interest to the enemy shareholder was held to be a species of confiscation, confiscation though not of the principal, yet of its proceeds. The decision of the majority of the Court of Appeal was upheld by the House of Lords without any dissent.[2] Lord Finlay, L.C. declared,[3] "It is not the law of this country that the property of enemy subjects is confiscated. Until the restoration of peace the enemy can, of course, make no claim to have it delivered up to him, but when peace is restored he is considered as entitled to his property with any fruits which it may have borne in the meantime." "The right of confiscation," said Lord Parmoor,[4] "of enemy property on land in favour of the Crown has long been disused, but it is a startling proposition that the right, so long disused by the Crown, can be claimed for the benefit of a private individual. This would be the creation of a privilege in favour of partners who, before the outbreak of the war, had been in partnership with enemies or enemy firms."

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[1] Hugh Stevenson and Sons Ltd. *v.* Aktiengeselschaft Für Cartonnagen—Industrie. (1917) 1 K. B. 842 (C. A.) Per Swinfen Eady and Bankes L. J J.; A. T. Lawrence J. dissenting.

[2] (1918) A.C. 239.

[3] *Ibid*, p. 244. See similar statement by Lords Haldane and Dunedin at pp. 247, 248.

[4] *Ibid*, p. 258.

A debt due to an enemy creditor cannot be paid him during war as it would be trading with the enemy, directly increasing the resources of the inhabitants of the enemy state. Does this imply that interest on the debt ceases to run during the war? A learned Judge of the High Court of Bombay boldly answers in the affirmative.[1] "The reason of the rule is obvious," says the learned Judge, "that a party should not be called upon to pay damages for retaining money which it was his duty to withold and not to pay it over." And he disallowed interest during war on promissory notes payable on demand with a stipulated rate of interest. But on the other hand why should the debtor be allowed the use of the money without making any recompense to the creditor? For the object is not retaliation, but necessary self-protection on the part of the state. But that is a doctrine which seems to find very little favour with the learned Judge, as his whole judgment shows. He even lays down that even if the debt can be paid without violating the rule against trading with the enemy, the debtor is entitled to keep it back without paying any interest, unless satisfied that the money paid will not enure to the benefit of the enemy. "That was his duty as a good citizen whatever might be permissible under Proclamations of Government," declares the learned Judge. Undoubtedly a "duty" which most persons would be only too willing to discharge quite whole-heartedly; and we may be sure that the 'satisfaction' spoken of will not be easy to generate. But the truth is that these matters are not left to individual judgment especially judgment of debtors; and "Proclamations of Government" are final in the matter. The learned Judge's

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[1] Padgett *v.* Jamsetji Hormushji: I. L. R. 41 Bombay, p. 390 (Macleod J.).

view is just such an inventing a new head of public policy against which Lord Halsbury protested in Janson *v.* Driefontein Consolidated Mines.[1] In the case of Hugh Stevenson & Sons[2] Swinfen Eady L. J. points out that in Wolff *v.* Oxholm[3] the plaintiffs recovered against the defendant, who had formerly been an enemy, a large sum for interest which accrued during the war. And says, "In like manner interest must run in favour of an enemy during the war, although not then actually payable to him." For law, even in war, cannot be so selfishly one-sided as not to make the rule reciprocal. *In re* Fried Kruff Actien-Gesellschaft[4] Younger J. refused to recognise a German ordinance cancelling all liability for agreed interest during suspense of payment; and one of the points made against the ordinance was that it was not made reciprocal. The learned Judge said, "The German debtor has the use during the period of suspension of the money he is prohibited from paying, and it is difficult to find any just reason why he should in these circumstances after the war be relieved of his contractual liability to pay interest when he is not relieved of the liability to repay the principal. In truth, however, there is no justice in the matter; the relief is interested and partial, as is sufficiently shown by the fact that it is not made reciprocal." When the case of Hugh Stevenson & Sons reached the House of Lords,[5] the point was discussed, and it was contended on the authority of two American cases[6] that in the case of a debt to a foreigner bearing interest no interest could accrue during the existence

[1] (1902) A.C. 484 (491).

[2] (1917) 1 K.B. 842 (C.A.) 850.

[3] (1917) 6 M. & S. 92.

[4] (1917) 2 Ch. 188 (193).

[5] (1918) A.C. 239.

[6] Hoare *v.* Allen (2 Dall. 102); Brown *v.* Hiatts (15 Wall. 177), a decision of the Supreme Court of the United States.

of hostilities between the countries of the debtor and the creditor. Of the five noble Lords who heard the case Lords Haldane and Dunedin reserved their opinions, but Lords Finlay, Atkinson and Parmoor thought the view contended for not to be in conformity with English Law.[1] "It is difficult to see on what principle the interest is to be forfeited if private property is to be respected," said Lord Finlay, L.C. And Lord Parmoor did not see in such a case any difference in principle between the payment of interest, and the payment of a capital sum. The appointment of public Custodians of enemy property to whom payments due to the enemy can be made during war, such as has been provided for in England[2] and in India[3] during the present war, removes all possible injustice to a debtor who, having no further use of the money is ready and willing to pay, but cannot do so on account of the war.

A debt due to an enemy cannot be paid, but can payment due from an enemy be received during war? Section 7 of the Proclamation of 9th of September 1914[4] provides that nothing in that proclamation "shall be deemed to prohibit payments by or on account of enemies to persons resident carrying on business or being in Our Dominions, if such payments arise out of transactions entered into before the outbreak of war." Though in form it seems like a declaration of the common law, an anxiety to keep it unaffected by anything in the Proclamation, perhaps the proper way to regard the provision is to deem it as a licence from the Crown to receive such payments; and

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[1] (1918) A.C. 239 (246, 248, 245, 256, 259).

[2] The Trading with the Enemy Amendment Act, 1914 (5 Geo. 5 1914).

[3] The Enemy Trading Act, 1915 (Act XIV of 1915).

[4] The Trading with the Enemy Proclamation No. 2.

Warrington, L.J. in Halsay *v.* Lowenfeld treats it as such.[1] For we must remember that removal of goods, even though one's own from the enemy country after a state of war has come into existence is not allowable.[2] This is doubtless because it may involve intercourse with the enemy—such intercourse as Lord Stowell was afraid of in The Hoop.[3] And receiving payment of money from the enemy, and granting him receipt which necessarily follows, certainly involve the possibility of such intercourse. Whether it is so slight as can be safely neglected it is only for the executive to say.

With reference to this provision it has been held that it is not illegal for a British subject to receive payment from a German Insurance Company during the present war, under a policy of marine insurance issued before the war, but the loss occurring after its commencement.[4] In Seligman *v.* Eagle Insurance Company[5] Neville J. decides that policies of life insurance with an English Company by a person who becomes enemy on declaration of war, are not voided by that event, and there is nothing illegal in the Company receiving the annual premiums during the war. The learned Judge says,[6] "I take it that if every alien enemy of the British Empire at the present time were to make an offer of all he possessed to various individuals residing within the limits of the British Empire there would be nothing illegal in British subjects accepting it unless there was reason to suspect bribery. It is not the payment and the concurrence involved in accepting

[1] (1916) 2 K.B. (C.A.) at 717.

[2] See *ante*, p. 91.

[3] 1 C. Rob. 196 (199, 200). See *ante*, pp. 16-17.

[4] W. L. Ingle, Ltd. *v.* Manheim Insurance Co. (1915) 1 K.B. 227.

[5] (1917) 1 Ch. 519.

[6] *Ibid.* p. 525.

the payment that can possibly be unlawful intercourse." But the passage itself shows that even payments by enemies cannot be left quite unregulated. They do involve intercourse with the enemy, and, with respect, it is not quite proper to sub-divide such intercourse into illegal and innocuous as a matter of general principle. All intercourse with the enemy is to be regarded as unlawful; but the executive authority of the State may raise the bar against some class or classes of such intercourse on grounds of policy, on a consideration of the relative advantage and detriment of allowing such intercourse to take place; but no judicial determination of such a matter is possible.

We have now finished our examination of the more important concrete forms which the general principle of prohibition of enemy intercourse during war assumes in actual practice. It is now time to deal with certain circumstances and transactions which are outside the scope of the prohibitory rule, but where there is a chance of considerations based on that rule being improperly introduced and resulting in confusion and injustice.

The first point to be noticed is that though the war may avoid a contract, or dissolve a business relationship because one of the parties to it has become an enemy, it does not destroy or affect the rights which have already accrued to the parties before the outbreak of war, out of such contract or relationship.[1] The rights in favour of the enemy cannot be enforced in British territory during war, because any satisfaction to him on the part of the subject or person under protection would be violating the rule against trading with the enemy and the enemy himself

[1] (1806) Exparte Boussmaker: 13 Ves. Jun. 71; Janson v. Driefontein Consolidated Mines, Ltd. (1902) A. C. 484 (493). Ertel Bieber & Co. v. Rio Tinto Company (1918) A.C. 260 (269).

has no right of audience in a British Court during the continuance of the war, but the remedy is not lost but only suspended during that period. And the rule is so scrupulously observed that even the time-honoured law of refusing to hear enemy suitors in any proceeding in English Courts has been a little pressed to make room for it. Thus in Exparte Boussmaker referred to, the Lord Chancellor (Erskine) allowed enemy creditors to prove in a commission of Bankruptcy. "The contract being originally good," he said, "upon the return of peace the right would survive. It would be contrary to justice therefore to confiscate this dividend. Though the right to recover is suspended, that is no reason why the fund should be divided among the other creditors."

The next thing to be pointed out is that such rights accruing to an enemy remain unaffected even though the contract was made in contemplation of the war. This was laid down in the well-known decision of the House of Lords in Janson *v.* Driefontein Consolidated Mines.[1] When the South African war was imminent, a subject of the Transvaal Government insured treasure with British Underwriters against capture during its transit from South Africa to England. The Transvaal Government seized the treasure in view of the war, which was shortly afterwards declared. It was held that the insured could recover on the policy from the British Company by recourse to the British Court after the termination of the war. Lord Halsbury L. C. said, "The principles upon which commercial intercourse must cease between nations at war with each other can only be where the heads of the State

[1] (1902) A. C. 484.

have created the state of war..... .....It is essential that the hostility must be the act of the nation which makes the war, and no amount of "strained relations" can affect the subjects of either country in their commercial or other transactions."[1]

The truth is that before the state of war actually exists no one is an enemy, and we must add, no one remains so after the termination of the war. The second part of the statement leads us to our third subject for consideration,—a matter which has been much discussed during the present war, *viz.*, whether the benefit to an enemy which it is the object of the rule against trading with the enemy to prevent is his benefit only during war, or it can have anything to do with his benefit even after the termination of the war. The question is important, not only as a matter of principle, but as widely affecting the actual law to be administered. On the opinions expressed by the noble and learned Lords in Daimler Company's case,[2] and on the decision of the Court of Appeal in Hugh Stevenson & Sons, Limited *v.* Aktiengesellschaft Für Cartinnagen-Industrie,[3] it may be taken as established in England that the "benefit" has only reference to the period of war; and that a transaction cannot be invalid by the application of the rule against trading with the enemy because its effect is to enrich the enemy after peace is restored. In the former case Lord Parker said,[4] "It was suggested in argument that acts otherwise lawful might be rendered unlawful by the fact that they might tend to the enrichment of the enemy when the war was

[1] *Ibid*, p. 493.
[2] (1916) 2 A. C. 307 (334, 347).
[3] (1917) 1 K. B. 842 (C. A.)
[4] (1916) 2 A. C. 307 (347).

over. I entirely dissent from this view.....The contention appears to me to extend the principle on which trading with the enemy is forbidden far beyond what reason can approve or the law can warrant.....Subject to any legislation to the contrary or anything to the contrary contained in the treaty of peace when peace comes, enemy property in this country will be restored to its owners after the war just as property in enemy countries belonging to His Majesty's subjects will or ought to be restored to them after the war. In the meantime it would be lamentable if the trade of this country were fettered, businesses shut down, or money allowed to remain idle in order to prevent any possible benefit accruing thereby to enemies after peace. The prohibition against doing anything for the benefit of an enemy contemplates his benefit during the war and not the possible advantage he may gain when peace comes." And it will be remembered that three other noble Lords taking part in the decision adopted Lord Parker's judgment as their own. Lord Shaw's treatment of the subject though short, is none the less incisive for that reason. "I do not detain your Lordships," said the noble Lord, "with what I think to be the extraordinary argument that if assets are realized and a business kept up enemy shareholders of an English Company, will, at the end of the war, be benefited. Possibly they may. It is true enough that on the other argument both they and the English shareholders might enormously suffer: so that a species of indirect pillage seems to be involved—pillage first of the enemy and secondly of English shareholders—thus presumably penalized for their association with others. I must respectfully decline to admit the validity of any argument of the kind."[1] In the second case cited the

[1] (1916) 2 A. C. 307 (334).

majority in the Court of Appeal decided in view of these considerations that an enemy partner was entitled to share of profits made by the English partner after the dissolution of the partnership on the outbreak of war, with the help of the enemy partner's capital. We have already had occasion to notice that the decision of the majority of the Court of Appeal was upheld by the House of Lords.[1] The House held that a contrary decision would mean confiscating the property of enemy subjects which is not English law. And in reply to the argument "that under modern conditions of finance some advantage might accrue to the enemy by holding his property in suspension during the continuance of the war" Lords Atkinson and Parmoor expressly rely upon and adopt[2] the opinion of Lord Parker in Dainber Co. *v.* Continental Tyre and Rubber Co. we have just quoted.

But the volume of judicial opinion in support of the contrary view is considerable. In the very case before the Court of Appeal, A. T. Lawrence J. dissented, and ingeniously suggested[3] that "it is not the interest of the State to build up a fund for the enemy's use when peace comes .....If the fund became too large I apprehend that international financiers would find a way to utilize its credit even during the war." A similar apprehension is expressed by Lord Atkinson in Ertel Bieber & Co. *v.* Rio Tinto Company.[4] We submit that if this speculation really tends to materialise on any occasion, emergency legislation will easily meet it. In the meantime it should not be allowed to affect general law and principles. It is not possible to keep down the suspicion that the giant

[1] (1918) A.C. 239.

[2] *Ibid*, pp. 249, 258.

[3] (1917) 1 K. B. 842 (C. A.) 855, 856.

[4] (1918) A.C. 260 (279).

struggle which began in August, 1914, has thrown some learned minds off proper perspective. There seems to be subconscious feeling that all past wars have been, at least all future wars will be, of the same scale and nature as the present one. So that everything that may be found necessary to provide for prosecuting this uncommon war ought to be made part of the common law of England. In his dissenting judgment in Tingley *v.* Müller,[1] Scrutton L. J. said that Lord Parker's opinion in the Daimler case, "will very much startle public opinion." Undoubtedly a risky guide for a judicial decision, and it is "public opinion" in time of war! In Zinc Corporation Limited *v.* Hirsch,[2] Swinfen Eady L. J. says, "Moreover the result of preserving intact for the defendants (as the agreement purports to do) all concentrates on the floors, in the vats, or otherwise made ready by the plaintiffs would be to protect the defendants' trade during the war and enable the defendants upon the conclusion of peace to resume their trade as speedily and in as great volume as possible, and so to diminish the effect of war on the commercial prosperity of the enemy country, which it is the object of this country during the war to destroy." But with great respect, the law of trading with the enemy can hardly take any note of what the ultimate object of the State may be in entering a war, whether occupation of the enemy territory, or destroying the commerce of the enemy country. And does not this object tend often to change with the progress of the war; and is the avowed object always the real one? The commerce which the law against trading with the enemy seeks to attack is such as may put resources into

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[1] (1917) 2 Ch. 144 (C. A.) 177.

[2] (1916) 1 K. B. 541 (C. A.) 557, 558.

the hands of the enemy State which may help it in the prosecution of the war. With the state of commerce of a country which is no longer an enemy country the law of trading with the enemy has no concern. Confusion can only result if the distinction is lost sight of. That the object of the present war on the part of England is to destroy the "commercial prosperity" of Germany "during the war" in a way that the result may effectively continue after the termination of the war is perhaps the German view of the matter. But it may "very much startle public opinion" to hear the same view endorsed by an English Lord Justice. With very great respect this looks very much like the judicial counterpart of the political opinion which would secure unbroken peace through eternal enmity with certain nations.

With this we shall close our brief review of the law of prohibited commercial intercourse during war.

Recent Legislation and Regulations.

We have not dealt specifically, and we do not mean to do so, the considerable body of Statutes, Proclamations, orders in Council and Ordinance, English and Indian, relating to trading with the nemy which have come out during the present war. An Anglo-Indian Judge[1] calls them a "bewildering array," "abounding in conflicting provisions"; and an English Lord Justice[2] finds marks "of considerable haste in drafting" in these "numerous and complicated" documents. But it is not because of these reasons that one can afford to neglect them. We have desisted from treating them because it is difficult to find a place for them in a discussion of the general

[1] Textile Manufacturing Co., Ltd. *v.* Salmon Brothers: I.L.R. 40 Bom. 570 (587) Macleod J.

[2] Tingley *v.* Muller (1917) 2 Ch. at 179. Scrutton L. J

principles of the law of trading with the enemy. So far as they lay down or elucidate any general principles they are merely either reminders of the common law or what was deemed as such, or applications of the common law to the complex and novel circumstances of modern commerce. And the most important of these provisions have been really touched upon in the course of our foregoing discussion. The rest are largely matters of procedure which have only an ephemeral interest, at least no theoretical one.

Position of Enemies as Suitors in British Courts during War

This subject is not really within the purview of the law of trading with the enemy. But it is so closely connected with it, and the principles underlying the one not being without effect on those underlying the other, we cannot altogether let it pass unnoticed. We shall very shortly state the settled law on the point, and make a few general observations.

The law relating to "proceedings in King's Courts by or against alien enemies during a state of war" was elaborately examined shortly after the commencement of the present war by the full Court of Appeal in Porter *v.* Freudenberg[1] and the judgment of the Court delivered by Lord Reading C. J. is a repository of almost the whole law on the subject. The main propositions may be shortly stated :—

An 'enemy' cannot sue, or continue a proceeding already instituted in a British Court during war,[2] but is

[1] (1915) 1 K. B. 857 (C.A.)

[2] Bradon *v.* Nesbitt (1794) 6 T. R. 23; M'Connell *v.* Hector (1802) 3 Bos. & Pul. 113; Boulton *v.* Dobree 2 Campb. 163; Alciator *v.* Smith 3 Camp. 245; Alcinous *v.* Nigreu (1854) 4 E. & B. 217. See Sec 83 of the Code of Civil Procedure, 1908 (India). *Cf.* I.L.R. 39 All. 377.

liable to be sued.[1] It follows that he can take all proceedings necessary for the purposes of defence.[2] But the right is strictly limited to the requirements of such purpose alone. Thus he cannot issue a third-party notice under Order XVI, Rule 48, of the Supreme Court Rules.[3] On the same principle an enemy defendant, who has lost in a subordinate court can appeal to a higher Tribunal; but one, who becomes an enemy on declaration of war, cannot appeal in a suit in which he was the plaintiff, such right being suspended during the war.[4] A postponement may be granted owing to difficulties in the enemy defendant's way of appearing and making an effective defence on account of the war.[5] He is entitled to the costs of a successful defence, but cannot take the money during war, which in practice means that his right to issue execution is suspended.[6]

We need not proceed into further details.

Now the first thing which must be noticed is that this disability of enemy suitors in British Courts during war is a much older doctrine than the rule against trading with the enemy. It will be remembered that in The Hoop[7] Lord Stowell deduces the latter debated rule from the undoubted former doctrine.

The next point to which we desire to call attention is that the grounds underlying the two rules are really quite

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[1] Porter *v.* Freudenberg: (1915) 1 K. B. 857 (C.A.) 880, 881; Robinson & Co. *v.* Continental Insurance Co., of Mannheim (1915), 1 K. B. 155; Abdul Quader *v.* Fritz Kapp., I.L.R. 43, Calcutta 1140.

[2] Porter *v.* Freudenberg (1915) 1 K. B. 857 (C.A.) 883.

[3] Halsey *v.* Lowenfeld (1916) 2 K. B. 707 (C.A.)

[4] Porter *v.* Freudenberg.

[5] *Ibid*, p. 892; (1915) 1 K. B. 155.

[6] (1915) 1 K. B. 155.

[7] (1799) 1 C. Rob. 196 (199-201). See *ante*.

different. The reason of the rule against trading with the enemy is necessary self-protection of the belligerent state. But the ground of the disability of enemy suitors cannot be anything but a feeling of incongruity and repugnance in allowing one the help of the Courts of a State against which he may be fighting. "I take the true ground upon which the plea of an alien enemy has been allowed is, that a man, professing himself hostile to this country..... .....cannot be heard if he sue for the benefit and protection of our laws in the Courts of this country," said Eyre C. J. in Sparenburgh *v.* Bannatyne.[1] And Lord Reading C. J. says in Porter *v.* Freudenberg,[2] "To allow an alien enemy to sue or proceed during war in the Civil Courts of the King would be to give to the enemy the advantage of enforcing his rights by the assistance of the King with whom he is at war." But on occasions the distinction has been confused, and the principle of the one rule has been sought to be applied to the other rule. Thus in M'Connel *v.* Hector,[3] Rook J. states that "the reason of the disability of the person residing in the enemy's country is, that the fruits of the action may not be remitted to an hostile country, and so furnish resources against this country." But that may be an argument for refusing execution to issue, but not against a suit to proceed. In Tingley *v.* Müller, Scrutton, L. J. says,[4] "I am very much impressed by the public danger of a decision which, at a time when British subjects are being called upon to give up their businesses to serve their country, will enable alien German subjects resident in

[1] (1797) 1 Bos. & Pul. 163.
[2] (1915) 1 K.B. 857 (C.A.) 880.
[3] (1802) 3 Bos. & Pul. 113.
[4] (1917) 2 Ch. 144 (C.A.) 180, 181.

Germany, and perhaps fighting against this country to carry on competing English business through trustees or agents, and to deal in the same way with English property." But this is feeling, may be very commendable feeling, but not the public policy on which the law against trading with the enemy rests.

This brings us to the third and the last point we wish to notice. It is probable that this confusion of the ground on which the disability of enemies to sue in King's Courts rests, with the ground of the rule against trading with enemy, has prevented the advance of the law on the former subject towards any liberal views and ideas. The public policy which underlies the latter has been vaguely imagined to support and justify the former also. But no reason of public policy forms the basis of the rule under which persons can sue immediately on the termination of the war on the same cause of action for which they could not take any proceedings during its progress. What possible harm can there be in allowing "enemies" to sue during war; and only preventing them from taking the fruits of the action during the continuance of the war, by the simple device of refusing execution to issue? It has been said that article 23(*h*) of the Hague Convention concerning land warfare made it unlawful for any country being a party to that convention to declare any right of action unenforceable or suspended by reason of the outbreak of war.[1] Lord Reading C. J. in Porter *v.* Freudenberg has controverted this view of that article of the Convention. But the more important thing than a correct judicial interpretation of that article is the fact that before the present war this was the opinion current on the Continent of Europe in

[1] See (1917) 2 Ch. at p. 192.

Countries which were parties to that Convention. Undoubtedly this is far in advance of the views and opinions of English Common Law on the subject. Britain with her insular position, and pre-eminent maritime supremacy, is exactly, in a condition to teach the world a lesson in civilized warfare on this subject. But unfortunately her laws are almost archaic on the point, and there is scarcely any chance of a change for the better in near future.

These observations and reflections receive interesting support from the recent decision of the House of Lords in Rodriguez *v.* Speyer Brothers.[1] A partnership carrying on banking business in London was dissolved on the outbreak of war as one of the six members of the firm became an 'enemy,' being a German subject resident in Germany. In the course of getting in the assets for liquidating the affairs of the firm an action was commenced for a debt which had become due prior to the war by the five other members, four of whom were British subjects and one a friendly neutral, adding as a co-plaintiff the enemy partner. This the law entitled them to do, and unless it were done his absence would have non-suited them on the plea of non-joinder of a co-contractor. The question was whether his presence would stop the action on a plea in abatement as offending against the rules which debarred an enemy suitor from audience in King's courts. The House differed in opinion. The majority (Lord Finlay L.C., Viscount Haldane and Lord Parmoor) answered in the negative, holding that the rule did not apply to such an action. Lords Atkinson and Sumner dissented and pronounced the action as not maintainable. In finding an answer, however, the foundation of the rule which disables an 'enemy' from suing in British Courts

[1] (1919) A. C. 59.

had to be examined. This was done by the noble Lords, but the result cannot be said to be satisfactory. The conclusion of the majority in substance was that the rule was not an unqualified and inflexible rule, but one founded on public policy, which was, in the words of Lord Finlay, "that the King's courts will give no assistance to proceedings which, if successful would lead to an enrichment of an alien enemy, and therefore would tend to provide his country with the sinews of war."[1] It followed that this reason of the rule did not affect an action like the one under consideration. For, in the words of the Lord Chancellor, "Any personal disability on the part of an alien enemy can hardly apply to a case where he is brought in as a party for the benefit of the other partners, British or neutral, and there is no danger of the alien enemy's being enriched by the proceedings, as none of the assets of the firm can be handed over to him during the war. To apply the rule against suing to such a case would be to inflict hardship not on the enemy but on British and neutral partners."[2] The proposition, however, that the rule of disability of enemy suitors rested on the public policy of preventing possible enrichment of the enemy, that is, a breach of the same public policy which prevented trading with the enemy, is taken for granted without any real discussion. Its historical truth, or logical soundness, is not probed. This matter, however, was elaborately considered in the dissenting judgments, specially the judgment of Lord Sumner. After going through the judgment, exhaustive in its examination of precedents, luminous in its exposition of principles, cogent in logic and vigorous in expression, few would be disposed

[1] (1919) A. C. 59 (66).

[2] (1919) A. C. 59 (71).

to challenge the learned Judge's conclusion that the rule against audience to enemy suitors has always been a rule of personal disability, which was perhaps taken as obvious by the mediæval mind. "He is an enemy of our Lord the King, in which case he shall have no benefit from his laws."[1] It is only the feeling of incongruity and repugnance, as we have ventured to say, in allowing one the help of the courts of a state against which he might be fighting. No ground of public policy actually underlies and shapes the rule except in so far as all general rules, which the law maintains, must be deemed to be for the public good, and which might be a fiction for all that. "My Lords," said the learned Judge,[2] "there are two quite separate principles to be considered in connection with contracts with an alien enemy. One forbids a subject to make or to perform certain contracts with an enemy. The other limits or, as I think, denies the capacity of an enemy, not enjoying the King's protection, to enter the courts as a suitor. Both commonly arise in the same case, and observations germane to the one are apt to be transferred or referred to the other. This, again, is a fertile source of confusion. The statement that both are based on the same broad consideration of public policy is historically without foundation, and finds no support in the books. The latter was full-grown centuries ago; the former only attracts much attention towards the end of the 18th century. The rule against trading with the enemy always is rested on public policy, and is represented as guarding the country against a public mischief..... .....The other rule has only recently been connected with public policy at all, and then only

[1] Dyer: 2b, case 8.

[2] (1919) A. C. 59 (122-123).

for the purpose of finding a modern explanation for supporting its invariable enforcement."

The observations on the subject which we have already made are enough to indicate that our sympathies are with the decision of the majority, but for reasons given in the judgment of the minority. The rule barring enemy suitors from courts is not based on any policy of public good or safety, but merely on blind revenge or perhaps, what is worse, on pedantic logic. It has no place in the jurisprudence of an age which prides in calling itself modern. To the question whether even the House of Lords can remove it from English common law the answer, one must recognise with regret, must be in the negative. The rule is too well-settled for any law court, be it the highest, to tamper with or explain away. The business is one for the Legislature. But how vain is the hope that any legislature representing British public opinion will think of entertaining such a proposal is well illustrated by this very case. Lords Sumner and Atkinson show conclusively in their judgments that the rule is not based on the public policy of not helping the enemy during war. Do they suggest therefore that it is anomalous in modern times? Not at all. On the contrary they find reasons, reasons not connected with war and its successful prosecution, as to why this rule should be strictly adhered to and stringently applied. To the argument that if actions like the one before the House be not allowed to proceed it will be hard on British subjects who have been partners with one who is now an enemy, Lord Sumner replies, "It may be hard, and yet wholesome for all that."[1] Evidently to the mind of the learned Judge there is something unwholesome in an

[1] (1919) A. C. 59 (132).

Englishman entering into partnership with an alien, for may not Britain one day be at war with the state of which the alien is the subject! Peace is only the interlude between two wars, and correct regulation of life in peace is its regulation with a view to the next war! The 'wholesomeness' of the rule is developed by Lord Atkinson thus,[1] "The removal of the well-established personal disability of enemy aliens to sue must free the mind of every friendly alien willing to embark in trade in any part of the King's dominions of every apprehension, that, should he become an enemy alien, he will experience any embarrassment in winding up his affairs. The absence of all anxiety upon that head would naturally make him all the more willing to enter into partnerships in this country with English partners, and would naturally make the English partners also all the more ready to receive him as a partner. And thus that system of the peaceful penetration by aliens into our commercial and industrial and financial enterprises, now recognised as a grave and serious danger to the state, would be encouraged and promoted." Thus the rule is an ally not of military rivalry during war but of economic rivalry during peace! And if this be the frame of mind to which the present war has put the most judicial minds of Britain the mental state of the ordinary man can more easily be imagined than characterised. Any proposal to modify a rule which harasses an 'enemy,' however senselessly, would be instantly dubbed as unpatriotic, if not worse.

Conclusion

It is time that we conclude. The rule against trading with the enemy is, as Lord Parker says,[2] a

[1] *Ibid*, pp. 105-106.

[2] (1916) 2 A. C. 307 (344).

belligerent's weapon of self-protection. Both protection is secured and injustice is avoided if that view and its logical consequences are firmly adhered to. The great English Judges who laid the foundation of the law of trading with the enemy built it on that plan. It would be lamentable if the superstructure belies the broad basis of the foundation. Care must be taken that the unusual stress of the present unprecedented war does not convert a weapon of self-protection into an instrument of a policy of eternal friction. Let not war and its considerations be conveyed into times of peace. For however all-engrossing war might be while it lasts, after all it is a passing phase. And we conclude with words of wisdom uttered more than twenty centuries ago that 'peace is the end of war.' [1]

[1] Aristotle: Politics, Book VIII, 15 (1).